TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

October Term, 1898. No.

No. 404.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE SOUTHERN AND ORE. NORTHWESTERN RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED [illegible], 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 821.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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THE UNITED STATES OF AMERICA
vs.
THE BALTIMORE AND OHIO SOUTH-WESTERN RAILROAD Company. | #768.

Docket entries.

Oct. 6, 1910. Indictment filed.
" " " Order for summons.
" " " Summons issued.
" 8 " Summons returned and filed endorsed executed: Received this writ at Cincinnati, Ohio, on October 6, 1910, and on October 7, 1910, I served the within-named The Baltimore and Ohio Southwestern Railroad Company, a corporation, etc., by delivering a true copy of this writ with the endorsements thereon to E. W. Scheer, assistant secretary of said company, by handing to him personally at Cincinnati, Ohio, no chief officer or higher representative of said railroad company found in this district upon whom to effect service. Eugene L. Lewis, U. S. marshal, by W. J. Sanderson, deputy.
Fees: $2.36.
" 11 " Plea of not guilty entered by counsel.
Nov. 26 " Order quashing indictment.
" 28 " Petition for a writ of error, filed.
" " " Assignment of errors, filed.
" " " Order allowing writ of error.
" " " Writ of error issued.
" " " Certified copy of writ of error made and filed.
" " " Citation issued.
" 30 " Citation returned and filed. service acknowledged.
" " " Certified copy made and filed.
" 28 " Præcipe for a transcript filed.

2 UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

In the District Court of the United States, within and for the district and division aforesaid.

Present, the Honorable Howard C. Hollister, district judge.

Among the proceedings had were the following, to wit:

THE UNITED STATES OF AMERICA
vs.
THE BALTIMORE & OHIO SOUTHWESTERN Railroad Company. | Indictment. No. 768.

Be it remembered that on the 6th day of October, in the year of our Lord one thousand nine hundred and ten, came the grand jurors

of the United States of America for the Southern District of Ohio, and presented to the court their certain bill of indictment herein, which said bill of indictment is clothed in the words and figures following, to wit:

Indictment.

THE UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio, ss:

In the District Court of the United States within and for the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit, of the term of October, in the year of our Lord one thousand nine hundred and ten.

1st count. Viol. of act of Mar. 3, 1905, 33 Stat., 1264. The grand jurors of the United States of America, duly empaneled, sworn, and charged to inquire within and for the Western Division of said district, upon their oaths and affirmations present:

That The Baltimore & Ohio Southwestern Railroad Com-
3 pany is a corporation organized under the laws of the States of Ohio and Indiana, and that it has an office and place of business in the city of Cincinnati, Hamilton County, Ohio, and within the jurisdiction of this court; that said The Baltimore and Ohio Southwestern Railroad Company is a common carrier of traffic and owns and operates a line of railroad in and through the State of Ohio and other States of the United States; and that said The Baltimore & Ohio Southwestern Railroad Company is a connecting common carrier, by and through which, and over whose said line of railroad interstate shipments of live stock originating in the State of Kentucky and other States of the United States and consigned for shipment to the city of Cincinnati, in the State of Ohio, and to the Union Stock Yards, in said city and State, are carried and transported to the said Union Stock Yards and to their destination at said city of Cincinnati, in the State of Ohio;

That pursuant to the act of Congress, approved March 3d, 1905 (33 Statutes, 1264), and under and by virtue of the authority therein conferred upon him, the Secretary of Agriculture of the United States, after having determined the fact that a contagious and communicable disease, known as scabies, existed among sheep in the State of Kentucky, on the 5th day of August, 1909, made and promulgated an order and regulation, known as Amendment 4 to Rule 3, Revision 1, B. A. I. Order 146, establishing a quarantine of all territory situate within the boundaries of the State of Kentucky, which said quarantine became effective on and after the 16th day of August, 1909;

That pursuant to and under and by virtue of the authority of said act of Congress, said Secretary of Agriculture made and issued certain "Regulations to prevent the spread of scabies in sheep," in-
cluded in and known as B. A. I. Order 143; which said regula-
4 tions and order became and were effective on the 15th day of April, 1907, and provided for, permitted and governed the

inspection, disinfection, certification, treatment, handling, and the method and manner of delivery and shipment of sheep diseased as aforesaid from the quarantined State of Kentucky and other quarantined States or Territories, into any other State or Territory; and that the provisions and requirements of Regulations 31 to 37, inclusive, being a part of and contained in said B. A. I. Order 143, were incorporated into and made a part of the order first aforementioned, to wit, Amendment 4 to Rule 3, Revision 1, B. A. I. Order 146, at the time said order was made, issued, and promulgated as herein set forth;

That said Secretary of Agriculture gave notice of the establishment of said quarantine and of the making and issuance of the aforesaid orders, rules, and regulations by sending printed copies of the same to said The Baltimore & Ohio Southwestern Railroad Company, and that receipt of such notice was acknowledged by C. C. F. Bent, as general manager of said railroad company;

That said Secretary of Agriculture gave notice of the establishment of said quarantine and of the making and issuance of the aforesaid orders, rules, and regulations, by publishing them in newspapers of general circulation in said quarantined State of Kentucky, as follows, to wit: In "The Frankfort News," published at Frankfort, Kentucky, in the issues of August 19th, 1909, and August 27th, 1909; in "The Paducah Evening Sun," published at Paducah, Kentucky, in the issue of August 16th, 1909; and in "The Louisville Herald," published at Louisville, Kentucky, in the issue of August 15th, 1909;

That on August 2nd, 1910, a shipment of one hundred and fifty-one (151) sheep, consigned by W. H. Lillard, at Danville, Kentucky, to Greene, Embry & Company, at Cincinnati, in the State of Ohio, was loaded into C. N. O. & T. P. car No. 9227 at Danville, in the State of Kentucky, and within the quarantined area established as aforesaid; and that said shipment of sheep, so contained in said car, was then and there delivered for transportation to The Cincinnati, New Orleans & Texas Pacific Railway Company, and was by said railway company transported and conveyed thence over its line of railroad to a point within the city of Cincinnati, in the State of Ohio, where said shipment arrived on the 3rd day of August, 1910; that said shipment of sheep, contained in said car, was, at the last mentioned time and place, delivered to The Baltimore & Ohio Southwestern Railroad Company, aforesaid, to be by it transported and delivered to the consignee thereof;

That said The Baltimore & Ohio Southwestern Railroad Company, unlawfully and in violation of the aforesaid orders and regulations of the Secretary of Agriculture, and after the issuance and promulgation of the said orders and regulations, and while the same were still in full force and effect, did then and there, at the time and place last aforementioned, receive the said shipment of sheep, contained in said car, and did transport the same over its said line of railroad to the Union Stock Yards at the city of Cincinnati, in the

State of Ohio, which was then and there the destination of said shipment of sheep;

That said car, C. N. O. & T. P. No. 9227, containing said interstate shipment of sheep from said quarantined State of Kentucky, did not then and there have affixed to both or either of the sides of said car, or at all, placards bearing the words, "Dipped scabby sheep," or the words "Exposed sheep for slaughter," as provided in said orders and regulations of the Secretary of Agriculture; and that the way bills, conductors' manifests, memoranda, and bills of lading pertaining to said shipment of sheep did not then and there have written or stamped upon the face thereof the words "Dipped scabby
6 sheep," or "Exposed sheep for slaughter," as required by said orders and regulations of the Secretary of Agriculture; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

2nd count. Viol. of act of Mar. 3, 1905; 33 Stat., 1264. And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That The Baltimore & Ohio Southwestern Railroad Company is a corporation organized under the laws of the States of Ohio and Indiana, and that it has an office and place of business in the city of Cincinnati, Hamilton County, Ohio, and within the jurisdiction of this court; that said The Baltimore & Ohio Southwestern Railroad Company is a common carrier of traffic and owns and operates a line of railroad in and through the State of Ohio and other States of the United States; and that said The Baltimore & Ohio Southwestern Railroad Company is a connecting common carrier, by and through which, and over whose said line of railroad, interstate shipments of live stock originating in the State of Kentucky and other States of the United States and consigned for shipment to or through the city of Cincinnati, in the State of Ohio, and to or through the Union Stock Yards in said city and State, are carried and transported to and through the said Union Stock Yards, and delivered to the next connecting carrier thereof, en route to their destination;

That pursuant to the act of Congress approved March 3rd, 1905 (33 Statutes, 1264), and under and by virtue of the authority therein conferred upon him, the Secretary of Agriculture of the United States, after having determined the fact that a contagious and communicable disease, known as scabies, existed among sheep in the State of Kentucky, on the 5th day of August, 1909, made and promulgated an order and regulation, known as Amendment 4 to
7 Rule 3, Revision 1, B. A. I. Order 146, establishing a quarantine of all territory situate within the boundaries of the State of Kentucky, which said quarantine became effective on and after the 16th day of August, 1909;

That pursuant to and under and by virtue of the authority of said act of Congress, said Secretary of Agriculture made and issued certain "Regulations to prevent the spread of scabies in sheep," included in and known as B. A. I. Order 143; which said regulations

and order became and were effective on the 15th day of April, 1907, and provided for, permitted and governed the inspection, disinfection, certification, treatment, handling, and the method and manner of delivery and shipment of sheep diseased as aforesaid from the quarantined State of Kentucky and other quarantined States or Territories, into any other State or Territory; and that the provisions and requirements of Regulations 31 to 37, inclusive, being a part of and contained in said B. A. I. Order 143, were incorporated into and made a part of the order first aforementioned, to wit, Amendment 4 to Rule 3, Revision 1, B. A. I. Order 146, at the time said order was made, issued and promulgated as herein set forth;

That said Secretary of Agriculture gave notice of the establishment of said quarantine and of the making and issuance of the aforesaid orders, rules and regulations by sending printed copies of the same to said The Baltimore & Ohio Southwestern Railroad Company, and that receipt of such notice was acknowledged by C. C. F. Bent, as general manager of said railroad company;

That said Secretary of Agriculture gave notice of the establishment of said quarantine and of the making and issuance of the aforesaid orders, rules and regulations, by publishing them in newspapers of general circulation in said quarantined State of Kentucky, as follows, to wit: In "The Frankfort News," published at Frankfort,
Kentucky, in the issues of August 19th, 1909, and August 27th,
8 1909; in "The Paducah Evening Sun," published at Paducah,
Kentucky, in the issue of August 16th, 1909; and in "The Louisville Herald," published at Louisville, Kentucky, in the issue of August 15th, 1909;

That on August 15th, 1910, a shipment of two hundred and nine (209) sheep, consigned by F. B. Mayo, at Hempridge, in the State of Kentucky, to the New England Dressed Meat & Wool Company, at Somerville, in the State of Massachusetts, was loaded into "Sou." car No. 43131, at Hempridge, in the State of Kentucky, and within the quarantined area established as aforesaid; that said shipment of sheep, so contained in said car, was then and there delivered for transportation to the Southern Railway Company, and was by said railway company transported and conveyed thence over its line of railroad to Lexington, in said State of Kentucky; and that said shipment of sheep, so contained in said car, was then and there and on the same day, by said Southern Railroad Company, delivered over for transportation to The Cincinnati, New Orleans & Texas Pacific Railway Company; and that said shipment of sheep, contained in said car, was by said last mentioned railway company transported and conveyed thence over its line of railroad to a point within the city of Cincinnati, in the State of Ohio, where said shipment arrived on the 17th day of August, 1910; and that said shipment of sheep, contained in said car, was, at the last mentioned time and place, delivered to The Baltimore & Ohio Southwestern Railroad Company aforesaid;

That said The Baltimore & Ohio Southwestern Railroad Company, unlawfully and in violation of the aforesaid orders and regulations of the Secretary of Agriculture, and after the issuance and promulgation of the said orders and regulations, and while the same were still in full force and effect, did then and there receive the said shipment of sheep, contained in the said car, and did transport the same over its line of railroad to the Union Stock Yards, at the city of
9 Cincinnati, in the State of Ohio, being a place en route to the destination of said shipment;

And that said car "Sou." No. 43131, containing said interstate shipment of sheep from said quarantined State of Kentucky, did not then and there have affixed to both or either of the sides of said car, or at all, placards bearing the words "Dipped scabby sheep," or the words "Exposed sheep for slaughter," as provided in said orders and regulations of the Secretary of Agriculture; and that the way-bills, conductors' manifests, memoranda, and bills of lading pertaining to said shipment of sheep did not then and there have written or stamped upon the face thereof the words "Dipped scabby sheep," or the words "Exposed sheep for slaughter," as required by said orders and regulations of the Secretary of Agriculture; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

3rd count. Viol. of act of Mar. 3, 1905; 33 Stat., 1264. And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That The Baltimore & Ohio Southwestern Railroad Company is a corporation organized under the laws of the States of Ohio and Indiana, and that it has an office and place of business in the city of Cincinnati, Hamilton County, Ohio, and within the jurisdiction of this court; that said The Baltimore & Ohio Southwestern Railroad Company is a common carrier of traffic and owns and operates a line of railroad in and through the State of Ohio and other States of the United States; and that said The Baltimore & Ohio Southwestern Railroad Company is a connecting common carrier, by and through which and over whose said line of railroad, interstate shipments of live stock originating in the State of Kentucky and other States of the United States and consigned for shipment to or through the city of Cincinnati, in the State of Ohio, and to or through the
10 Union Stock Yards in said city and State, are carried and transported to and through the said Union Stock Yards and delivered to the next connecting carrier thereof, en route to their destination;

That pursuant to the act of Congress approved March 3d, 1905 (33 Statutes, 1264), and under and by virtue of the authority therein conferred upon him, the Secretary of Agriculture of the United States, after having determined the fact that a contagious and communicable disease, known as scabies, existed among sheep in the State

of Kentucky, on the 5th day of August, 1909, made and promulgated an order and regulation, known as Amendment 4 to Rule 3, Revision 1, B. A. I. Order 146, establishing a quarantine of all territory situate within the boundaries of the State of Kentucky, which said quarantine became effective on and after the 16th day of August, 1909;

That pursuant to and under and by virtue of the authority of said act of Congress said Secretary of Agriculture made and issued certain "Regulations to prevent the spread of scabies in sheep," included in and known as B. A. I. Order 143; which said regulations and order became and were effective on the 15th day of April, 1907, and provided for, permitted and governed the inspection, disinfection, certification, treatment, handling, and the method and manner of delivery and shipment of sheep diseased as aforesaid from the quarantined State of Kentucky and other quarantined States or Territories into any other State or Territory; and that the provisions and requirements of Regulations 31 to 37, inclusive, being a part of and contained in said B. A. I. Order 143, were incorporated into and made a part of the order first aforementioned, to wit, Amendment 4 to Rule 3, Revision 1, B. A. I. Order 146, at the time said order was made, issued, and promulgated as herein set forth;

11 That said Secretary of Agriculture gave notice of the establishment of said quarantine and of the making and issuance of the aforesaid orders, rules, and regulations by sending printed copies of the same to said The Baltimore & Ohio Southwestern Railroad Company, and that receipt of such notice was acknowledged by C. C. F. Bent, as general manager of said railroad company;

That said Secretary of Agriculture gave notice of the establishment of said quarantine and of the making and issuance of the aforesaid orders, rules, and regulations, by publishing them in newspapers of general circulation in said quarantined State of Kentucky, as follows, to wit: In "The Frankfort News," published at Frankfort, Kentucky, in the issues of August 19th, 1909, and August 27th, 1909; in "The Paducah Evening Sun," published at Paducah, Kentucky, in the issue of August 16th, 1909; and in "The Louisville Herald," published at Louisville, Kentucky, in the issue of August 15th, 1909;

That on August 25th, 1910, a shipment of two hundred and sixteen (216) sheep, consigned by Tatum, Embry & Company, at Louisville, in the State of Kentucky, to the New England Dressed Meat & Wool Company, at Somerville, in the State of Massachusetts, was loaded into W. L. S. E. car No. 40927, at Louisville, in the State of Kentucky, and within the quarantined area established as aforesaid; that said shipment of sheep, so contained in said car, was then and there delivered for transportation to the Louisville & Nashville Railroad Company, and was by said railroad company transported and conveyed thence over its line of railroad to a point within the city of Cincinnati, in the State of Ohio, where said shipment arrived on the 26th day of August, 1910; that said shipment of sheep, contained

in said car, was, at the last mentioned time and place, delivered to The Baltimore & Ohio Southwestern Railroad Company aforesaid;

That said The Baltimore & Ohio Southwestern Railroad Company, unlawfully and in violation of the aforesaid orders and regulations of the Secretary of Agriculture, and after the issuance and promulgation of the said orders and regulations, and while the same were still in full force and effect, did then and there receive the said shipment of sheep, contained in the said car, and did transport the same over its line of railroad to the Union Stock Yards, at the city of Cincinnati, in the State of Ohio, being a place en route to the destination of said shipment;

And that said car, W. L. S. E. No. 40927, containing said interstate shipment of sheep from said quarantined State of Kentucky, did not then and there have affixed to both or either of the sides of said car, or at all, placards bearing the words "Dipped scabby sheep," or the words "Exposed sheep for slaughter," as provided in said orders and regulations of the Secretary of Agriculture; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SHERMAN T. MCPHERSON,
United States Attorney, S. D. O.

Entry 10–252. And also on the same day, an entry was made on the journal of said court in said cause, which said entry is clothed in the words and figures following, to wit:

THE UNITED STATES OF AMERICA
vs.
THE BALTIMORE & OHIO SOUTHWESTERN Railroad Company. } No. 768.

Upon motion of the United States attorney for an order directing that a summons be issued against the defendant in this case, the court, on consideration thereof, doth order that the clerk issue a summons in this case against defendant herein, to be served upon said defendant according to law, directing it to be and appear in the court room of the United States District Court for this division and district, on the 12th day of October, A. D. 1910, at 9.30 o'clock a. m.; and that said summons set out that defendant is charged with a violation of the act of Congress of March 3d, 1905, 33 Statutes, 1264, and the rules and regulations of the Secretary of Agriculture promulgated thereunder; and that for a more complete statement of said charge, defendant is referred to the indictment filed herein.

Summons.

And thereupon there was issued out of the clerk's office of said court, and directed to the marshal of this district, and against the said defendant, a certain writ of summons herein, clothed in the words and figures following, to wit:

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:
The President of the United States of America, to the marshal of the Southern District of Ohio, greeting:

You are commanded to notify The Baltimore & Ohio Southwestern Railroad Company, a corporation organized and existing under and by virtue of the laws of the States of Ohio and Indiana, to be and appear before the judge of the District Court of the United States for the Western Division of the Southern District of Ohio, at Cincinnati, Ohio, on the 12th day of October, 1910, at 9.30 o'clock a. m., to answer unto the United States of America on an indictment for violation of the act of Congress of March 3d, 1905, 33 Statutes, 1264, and the rules and regulations of the Secretary of Agriculture promulgated thereunder, presented to said court against the said The Baltimore & Ohio Southwestern Railroad Company, on the 6th day of October, A. D. 1910, by the grand jury of the United States within and for the Western Division of the Southern District of Ohio. (For
14 a more complete statement of said charge, defendant is referred to the indictment filed herein.)

Hereof fail not, under the penalty of the law, and have then there this writ.

Witness, the Honorable Howard C. Hollister, judge of the District Court of the United States, this 6th day of October, A. D. 1910, and in the 135th year of the independence of the United States of America.

Attest: B. E. DILLEY, *Clerk.*
[SEAL.] By F. A. HIGHT, *Deputy.*

(Endorsement:) Indictment. Violation of act of Congress of March 3d, 1905, 33 Statutes, 1264, and the rules and regulations of the Secretary of Agriculture promulgated thereunder.

Return.

And afterwards, to wit, on the 8th day of October, A. D. 1910, came the marshal of said district to whom said writ was in form directed, and returned the same into the clerk's office of said court, with his proceedings endorsed thereon, clothed in the words and figures following, to wit:

Received this writ at Cincinnati, Ohio, on October 6, 1910, and on October 7, 1910, I served the within named The Baltimore & Ohio Southwestern Railroad Company, a corporation, etc., by delivering a true copy of this writ, with the endorsement thereon, to E. W.

Scheer, assistant secretary of said company, by handing same to him personally, at Cincinnati, Ohio; no chief officer or higher representative of said railroad company found in this district upon whom to effect service. Eugene L. Lewis, U. S. marshal, S. D. O. By W. J. Sanderson, deputy. Fees, $2.36.

And afterwards, to wit, on the 11th day of October, A. D. 1910, an entry was made on the journal of said court, in said cause,
15 which said entry is clothed in the words and figures following, to wit:

Entry 10–259:

THE UNITED STATES OF AMERICA
vs.
THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, etc.

This day came the defendant, The Baltimore & Ohio Southwestern Railroad Company, by its counsel, A. W. Goldsmith, jr., and entered a plea of not guilty.

And afterwards, to wit, on the 26th day of November, A. D. 1910, an entry was made on the journal of said court in said cause, which said entry is clothed in the words and figures following, to wit:

Entry 10–279:

United States District Court, Southern District of Ohio, Western Division, No. 768.

THE UNITED STATES OF AMERICA
vs.
THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY. } Entry.

It appearing to the court that an indictment has been filed herein charging the defendant, The Baltimore & Ohio Southwestern Railroad Company, with a violation of the act of Congress of March 3rd, 1905, 33 Statutes, 1264, and the rules and regulations of the Secretary of Agriculture made and promulgated thereunder, in that said defendant, a common carrier, did receive and transport in and about the city of Cincinnati, in the State of Ohio, certain shipments of sheep originating in the State of Kentucky, which last mentioned State had theretofore been quarantined in accordance with law for "Scabies in sheep;" that said defendant did not receive said shipments of sheep in said quarantined State of Kentucky and did not transport the same therefrom, but did receive and transport the same wholly and entirely outside of said quarantined State, and after the same had been transported therefrom by another carrier;

And it further appearing to the court that a fundamental point of law involved in this case has been heretofore decided by this
16 court adversely to the United States in cases similar in all re-

spects to the one now before the court, to wit, in cases Numbers 730, 731, and 736 in this court, entitled The United States of America versus The Baltimore & Ohio Southwestern Railroad Company, wherein demurrers to the informations were sustained; it being the decision of this court therein that the defendant could not be held to answer said charge, because said informations upon their faces showed that said defendant had not received the shipments of sheep in question in the quarantined State of Kentucky and had not transported the same from said quarantined State, but that said defendant had received said shipments of sheep at a place, and had transported the same through places, wholly and entirely without said quarantined State of Kentucky; and that such facts, in the opinion of this court, did not constitute a violation of the aforesaid act of Congress;

Now, therefore, this court, inquiring into this case upon its own motion and for the purpose of enabling the United States to have the question here at issue reviewed, doth find that the indictment herein is not well founded in point of law and doth hereby quash the same and each count thereof, for the reasons hereinbefore mentioned; and it is the judgment of this court that the indictment herein be, and the same hereby is, dismissed.

Whereupon comes the United States attorney and on behalf of the United States excepts to all of the above and to the ruling and judgment of the court herein and gives notice of intention to file error proceedings to the Supreme Court of the United States.

And afterwards, to wit, on the 28th day of November, A. D. 1910, there was filed in the clerk's office of said court a certain petition for writ of error in this cause, which said petition for writ of error
17 is clothed in the words and figures following, to wit:

Petition for writ of error.

District Court of the United States, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, defendant.	No. 768.

Petition for writ of error.

Now comes the United States of America, plaintiff herein, and says that on the twenty-sixth day of November, 1910, this court entered a judgment herein against the plaintiff and in favor of the defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this

plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore the United States of America, plaintiff herein, prays that a writ of error may issue in its behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

SHERMAN T. MCPHERSON,
United States Attorney for the Southern District of Ohio.

Assignment of errors.

And also on the same day there was filed in the clerk's office of said court a certain assignment of errors in said cause, which said assignment of errors is clothed in the words and figures following, to wit:

District Court of the United States, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, defendant. No. 768.

Assignment of errors.

The plaintiff in this action, in connection with its petition
18 for a writ of error, makes the following assignment of errors, which it avers were committed by the court in its judgment in this cause, to wit:

1. The court erred in its decision and judgment quashing the indictment herein and each count thereof.

2. The court erred in its decision and judgment quashing the indictment herein, and each count thereof, upon the construction of the statute upon which said indictment and each count thereof is founded.

3. The court erred in its decision and judgment in not sustaining the indictment herein, and each count thereof.

For these reasons the plaintiff, the United States of America, asks that this case be reviewed, and that such judgment be rendered in the Supreme Court of the United States as should have been rendered in the court below; and that such action be taken as will protect the rights of the plaintiff in the premises.

SHERMAN T. MCPHERSON,
United States Attorney for the Southern District of Ohio.

Entry 10–281. And also on the same day an entry was made on the journal of said court, in said cause, which said entry is clothed in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, defendant. } No. 768.

Now comes the United States attorney on behalf of the plaintiff and presents for allowance a petition for writ of error and assignment of errors accompanying same, upon consideration of which the court hereby allows said petition and orders a writ of error to the Supreme Court of the United States.

19 *Praecipe for transcript.*

And afterwards, to wit, on the same day there was filed in the clerk's office of said court a certain praecipe for transcript in this cause, which said praecipe is clothed in the words and figures following, to wit:

Southern District of Ohio, Western Division. No. 768. United States District Court.

THE UNITED STATES
vs.
THE BALTIMORE & OHIO SOUTHWESTERN Railroad Company.

To B. E. DILLEY, *Clerk of said court:*

Please prepare a transcript of all pleadings and papers, together with the docket and journal entries in this cause, to be filed in the Supreme Court of the United States.

SHERMAN T. MCPHERSON,
Attorney for United States.

20 *Certificate to transcript.*

United States District Court, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD Company, a corporation, etc., defendant. } No. 768.

I, B. E. Dilley, clerk of the court aforesaid, do hereby certify that the foregoing is a true, correct, and complete transcript of the pro-

ceedings had by and before said court in the above entitled cause, as the same appear of record and on file in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, Ohio, this 3d day of December, A. D. 1910.

[SEAL.] B. E. DILLEY, *Clerk.*
By HARRY F. RABE, *Deputy.*

21 UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

The President of the United States, to the honorable, the judge of the District Court of the United States for the Southern District of Ohio, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court before you, between The United States of America, plaintiff, and The Baltimore & Ohio Southwestern Railroad Company, defendant, a manifest error hath happened, to the great damage of the said The United States of America, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, on the 28th day of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

22 Witness, the Honorable John M. Harlan, Associated Justice of the United States, the 28th day of November, in the year of our Lord one thousand nine hundred and ten, and of the independence of the United States of America, the one hundred and thirty-fifth.

[SEAL.] B. E. DILLEY,
Clerk of the District Court of the United States for the Southern District of Ohio.

Allowed by:
HOWARD C. HOLLISTER,
Judge of the District Court of the United States for the Southern District of Ohio.

23 THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

To The Baltimore & Ohio Southwestern Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the

city of Washington, in the District of Columbia, on the 28th day of December next, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the Southern District of Ohio, wherein The United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as is in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, Associate Justice of the United States, this 28th day of November, in the year of our Lord one thousand nine hundred and ten, and of the independence of the United States of America the one hundred and thirty-fifth.

HOWARD C. HOLLISTER,
Judge of the District Court of the United States for the Southern District of Ohio.

Service of the above citation is hereby acknowledged, and the appearance of the defendant in error herein in the Supreme Court of the United States entered this 30th day of November, 1910.

GEO. HOADLY,
Counsel for The B. & O. S. W. R. R. Co., defendant in error.

(Indorsement on cover:) File No. 22442. S. Ohio, D. C. U. S. Term No. 821. The United States, plaintiff in error, *vs.* The Baltimore & Ohio Southwestern Railroad Company. Filed December 10th, 1910. File No. 22442.

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69638—10——2

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY. } No. 464.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The Baltimore and Ohio Southwestern Railroad Company was indicted in the Southern District of Ohio for violations of the act of March 3, 1905 (33 Stat., 1264), entitled "An act to enable the Secretary of Agriculture to establish and maintain quarantine districts, to permit and regulate the movement of cattle and other live stock therefrom, and for other purposes."

THE INDICTMENT

was in three counts, each charging a different offense, but the offenses were all of the same nature. It will be sufficient for the purposes of this case to consider only the first count. (Rec., 2–4.)

This charged that the company was a common carrier owning and operating a line of railroad in the State of Ohio and other States, and that this line was a connecting one over which interstate shipments of live stock originating in the State of Kentucky and consigned to the Union Stock Yards in the city of Cincinnati, in the State of Ohio, were carried and transported to their destination;

That the Secretary of Agriculture had determined the fact that a contagious and communicable disease known as scabies existed among sheep in the State of Kentucky, and on the 5th day of August, 1909, made and promulgated an order and regulation known as amendment 4 to rule 3, revision 1, B. A. I. Order 146, establishing a quarantine of the entire territory of the State of Kentucky, which quarantine became effective on and after the 16th day of August, 1909;

That the Secretary of Agriculture, pursuant to law, had made and issued certain regulations effective on and after the 15th day of April, 1907, which provided for and governed the inspection, disinfection, certification, treatment, handling, and the method and manner of delivery and shipment of sheep from quarantined States or Territories into any other State or Territory, and that these provisions, requirements, and regulations, being 31 to 37, B. A. I. Order 143, were incorporated into and made a part of the order, amendment 4 to rule 3, revision 1, B. A. I. Order 146;

That the Secretary of Agriculture gave notice of the establishment of quarantine in the State of Kentucky and of the making and issuance of the rules

and regulations heretofore referred to, by sending printed copies to the railroad company, receipt of such copies being acknowledged by the general manager of the company;

That the Secretary of Agriculture also gave notice of the establishment of the quarantine and of the orders, rules, and regulations hereinbefore mentioned by publication in newspapers of general circulation in the State of Kentucky;

That on August 2, 1910, a shipment of 151 sheep was made at Danville, in the State of Kentucky, and within the quarantined area, by W. H. Lillard, consigned to Greene, Embry & Company, at Cincinnati, in the State of Ohio; that the sheep were loaded and delivered for transportation to The Cincinnati, New Orleans & Texas Pacific Railway Company and taken by that company over its line to a point in the city of Cincinnati, in the State of Ohio, and there delivered to the Baltimore and Ohio Southwestern Railroad Company, which in turn took them over its line of road in the State of Ohio to the Union Stock Yards, city of Cincinnati, the destination of the shipment, and delivered them to the consignees;

That the car containing this shipment of sheep, while it was being handled by the Baltimore and Ohio Southwestern Railroad Company, did not have affixed to both or either of its sides, or at all, placards bearing the words "Dipped scabby sheep" or the words "Exposed sheep for slaughter," as required by the orders and regulations of the Secretary of Agriculture; and the waybills, conductors' manifests,

memoranda, and bills of lading pertaining to the shipment did not have written or stamped upon their face the words "Dipped scabby sheep" or "Exposed sheep for slaughter," as required by the orders and regulations of the Secretary of Agriculture; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

The defendant pleaded not guilty to the indictment (R., 10), but the court disposed of the case in the manner disclosed by the following

ENTRY OF JUDGMENT.

> It appearing to the court that an indictment has been filed herein charging the defendant, The Baltimore and Ohio Southwestern Railroad Company, with a violation of the act of Congress of March 3rd, 1905, 33 Statutes, 1264, and the rules and regulations of the Secretary of Agriculture made and promulgated thereunder, in that said defendant, a common carrier, did receive and transport in and about the city of Cincinnati, in the State of Ohio, certain shipments of sheep originating in the State of Kentucky, which last mentioned State had theretofore been quarantined in accordance with law for "Scabies in sheep;" that said defendant did not receive said shipments of sheep in said quarantined State of Kentucky and did not transport the same therefrom, but did receive and transport the same wholly and entirely outside of said quarantined State, and after the same had been transported therefrom by another carrier;

And it further appearing to the court that a fundamental point of law involved in this case has been heretofore decided by this court adversely to the United States in cases similar in all respects to the one now before the court, to wit, in cases Numbers 730, 731, and 736 in this court, entitled The United States of America versus The Baltimore & Ohio Southwestern Railroad Company, wherein demurrers to the informations were sustained; it being the decision of this court therein that the defendants could not be held to answer said charge, because said informations upon their faces showed that said defendant had not received the shipments of sheep in question in the quarantined State of Kentucky and had not transported the same from said quarantined State, but that said defendant had received said shipments of sheep at a place, and had transported the same through places, wholly and entirely without said quarantined State of Kentucky; and that such facts, in the opinion of this court, did not constitute a violation of the aforesaid act of Congress;

Now, therefore, this court, inquiring into this case upon its own motion and for the purpose of enabling the United States to have the question here at issue reviewed, doth find that the indictment herein is not well founded in point of law and doth hereby quash the same and each count thereof, for the reasons hereinbefore mentioned; and it is the judgment of this court that the indictment herein be, and the same hereby is, dismissed. (R., 10, 11.)

The case is brought here by the Government by writ of error to review this judgment and ruling of the District Court.

In an appendix hereto we set out—

1. *The act of March 3d, 1905*, except the fifth section thereof, which section has no possible relevancy to the case.

2. *The report of the House Committee on Agriculture upon the bill.* This report was approved and adopted by the Senate Committee on Agriculture as its own. The bill, except as to its fifth section, not relevant here, was passed into law in the precise form in which it was reported.

3. *Regulations of the Secretary of Agriculture made and promulgated April 3d, 1907*, as Order No. 143 of the Department of Agriculture, B. A. I. We set these out from No. 29 to 37, both inclusive, these numbers being the entire general code of "Regulations to prevent the spread of scabies in sheep."

4. *Amendment 4 to Rule 3, Revision 1*, effective on and after August 16, 1909. This is the order declaring the existence of scabies among sheep in Kentucky and declaring a quarantine in the State. Regulations 31 and 32 are printed on the reverse side of this order, but are not set forth in this connection in the appendix, because they are contained in the regulations printed under the third head.

The sole question considered by the lower court was that with respect to the construction of the statute, and the determination of the court was that the

statute applied only to the carrier taking the sheep in the quarantined State and transporting them without the State, and did not apply to any succeeding carrier who received the sheep outside of the quarantined State and continued or completed the transportation of them to the point of their destination. The Government contends for the

PROPOSITION

that the statute applies to the shipment of sheep from a quarantined State or Territory into any other State or Territory of the Union and to every carrier participating in such shipment, not alone the initial carrier who takes up the sheep in the quarantined district and carries them without, but as well to every succeeding connecting carrier doing any part of the work of transportation necessary to bring the shipment from its place of beginning to its place of destination.

ARGUMENT.

The act under consideration was H. R. 17589. The same bill was introduced in the Senate as Senate bill 7167. The House bill became law.

The act has been before the courts a number of times. In three reported cases the question here involved was presented for determination and decided in two of them adversely and in the third and latest favorably to the Government.

The question is in itself one of great practical importance, and the diversity of ruling in the lower courts makes a definite and final decision upon it highly desirable.

This court took notice of the act in *Asbell* v. *Kansas* (209 U. S., 251), but had occasion to say little more than that "large powers to control the interstate movement of cattle liable to be afflicted with a communicable disease have been conferred upon the Secretary of Agriculture by the act of February 2, 1903, 32 Stat. 791, and the act of March 3, 1905, 33 Stat. 1264" (p. 257).

The first reported prosecution under the act was in *United States* v. *L. & N. R. R. Co.* (165 Fed., 936), in the Western District of Kentucky; but all the matters there passed upon related to the formal sufficiency of the indictment, and as no such questions are here involved that case calls for no consideration at the present time.

In *United States* v. *Louisville & Nashville Railroad Company* (176 Fed., 942) the application of the law to connecting carriers was not involved. The case none the less calls for consideration because the court held, upon the authority of *United States* v. *Grimaud* (170 Fed., 205), that a charge of crime could not be based upon a violation of the regulations provided for in section three of the act, and that section four was therefore of no practical effect.

But the ruling of the court in the *Grimaud* case was reversed by this court at the October Term, 1910, and a violation of the regulations there involved was held to be a violation of the law pursuant to which they were made. (*United States* v. *Grimaud*, 220 U. S., 506.)

The analogy between the *Grimaud* case and the one at bar is a very close one. There is in neither case a delegation of lawmaking power to the Secretary. In each case the crimes or offenses punishable under the act are defined by the act itself. In the present case the duties imposed upon the Secretary are plainly administrative in their nature.

Section 1 simply imposes upon the Secretary the duty to ascertain and declare the existence of contagious diseases in live stock in any State or Territory as a fact, and requires that upon the ascertainment and declaration of the fact he shall establish a proper quarantine and give notice thereof to the transportation companies and the general public.

Section 2 prohibits the receiving for transportation, or transporting, live stock from any quarantined State or Territory into any other State or Territory, except as later provided in the act.

Section 3 authorizes and directs the Secretary of Agriculture, when the public safety will permit, to promulgate rules and regulations in accordance with which live stock may be inspected, disinfected, certified, treated, handled, delivered, and shipped from a quarantined State or Territory into any other State or Territory, and requires that notice of these rules and regulations shall be given to the transportation companies and to the general public. There is nothing in this that is in the nature of enacting law. The proper safeguarding of live stock which is either diseased or has been exposed to disease, when this is to be shipped from one part of the country to another,

is plainly an administrative matter properly imposed upon the Secretary of Agriculture, because it requires expert knowledge which, it must be presumed, representatives of the Department of Agriculture possess. The particular regulations will depend upon the nature of the disease and its extent, and are therefore to be adapted to each particular emergency.

Section 4 of the act qualifies the otherwise absolute ban upon a shipment of live stock from a quarantined State into another State imposed by section 2, and provides, first, that live stock may be moved from a quarantined State into any other State under and in compliance with the rules and regulations made and promulgated by the Secretary of Agriculture; and, second, that it shall be unlawful to move live stock from a quarantined State into any other State or Territory in any manner or method or under conditions other than those prescribed by the Secretary of Agriculture.

Section 6 punishes any violation of section 2 or section 4 of the act.

Plainly it is Congress which defines the offense, for it is Congress that has directed the Secretary to make the regulations in accordance with which live stock may be moved out of a quarantined State and it is Congress that has prohibited their movement except in compliance with those regulations.

The House Committee carefully considered the adjudications upon the acts of 1884 and 1903, as their report discloses, and they had especially in mind that the power of the Secretary could not be

extended to the making of regulations which in themselves had the force of law or which did more than administer the law which Congress enacted.

Under the law governing forest reserves there was no absolute right to anybody to make use of the reserves, but as there might be a use of them by individuals which was not opposed to the purposes of the law, the Secretary of Agriculture was authorized to prescribe regulations under which such use might be enjoyed, and a violation of these regulations was declared by the law to be a crime. Grimaud was held to have offended this law because he pastured his flock in a reserve in disregard of the regulations prescribed by the Secretary.

In the case at bar Congress, in the exercise of undoubted powers, dealt with the subject of the interstate movement of cattle which were afflicted with or had been exposed to a communicable disease. It determined that such movement could not properly be left free or at the will of the owners, and yet to prohibit it altogether and in all cases of a quarantine would entail great and unnecessary hardship. The exigencies of each case could not possibly be foreseen and provided for in advance by law. It was given by the law to the Secretary to determine as a matter of fact whether the disease existed, and thereupon to establish a quarantine, and in like manner it was given to him by the law to determine as a fact of the same kind whether in any case "the public safety would permit" the movement of the cattle from the district of quarantine into another

State; and, if so, to prescribe the precautions with which such movement should be attended. The interstate movement in other manner from a quarantined district was made an offense *by the law.* The Secretary was empowered simply to ascertain as a fact, what was a matter of fact, and might exist at one time or place and not at another, the existence of the conditions which called the law into operation, and then to administer the law in such manner as the conditions of fact ascertained by him required.

This was in strict conformity with what was said in *Field* v. *Clark* (143 U. S., 649), and cited with approval in the *Grimaud* case, viz:

> * * * "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation" (p. 694).

Sections three and four of the law are therefore valid, and are as much to be taken into account in determining what are offenses against it as are sections one and two.

United States v. *El Paso and N. E. R. R. Co.* (178 Fed., 846), like the case at bar, was an indictment of a

connecting carrier who took the shipment from the initial carrier outside the quarantined State and carried it to its destination. The case was considered solely with reference to sections one and two of the law and the connecting carrier held not to be within their scope. The opinion of the court is supported by no authority and by no argument, and as to this question is in full as follows (pp. 847, 848):

> Owing to the pressure of official engagements the court can do little more than state its conclusions.
>
> 1. It was the intention of Congress, as manifested by the second section of the act, to punish only the carrier which transports cattle from a quarantined district, and not the carrier to which cattle may be subsequently delivered by the first carrier for transportation, although they may be from such a district. To be more specific: According to the allegations of the indictment, the Chicago, Rock Island & Pacific Railway Company received in Texas county, Okl., and transported to New Mexico, and there delivered to the defendant, the two head of cattle in question. The cattle were then transported by the defendant to El Paso, Tex. Construing the law, as applied to the allegations of the indictment, the carrier amenable to punishment, if justified by all the evidence of the case, would be the Chicago, Rock Island & Pacific Railway Company, and not the defendant, since the latter did not transport, from a quarantined district, cattle to be transported into any state or territory. In other words, the initial car-

rier, receiving or transporting the cattle, and not subsequent ones, would be punishable under the act.

United States v. *C., B. & Q. R. R. Co.* (181 Fed., 882) was also the case of a connecting carrier, and the ruling was the same as in the preceding case.

The cattle were shipped from Maud, in the State of Oklahoma, a quarantined district, through Kansas to St. Joseph, Missouri. The regulations required that the car should be placarded as containing "southern cattle," and that the waybills, etc., should so designate them. In fact, the car was not placarded at all, and the waybills, etc., designated the shipment as being "native cattle." The Missouri, Kansas & Texas Railway Company was the initial carrier and was necessarily cognizant of and participated in this false description in the billing and was also responsible for the failure to placard the car. This company took the cattle in Oklahoma, through Kansas to Kansas City, Missouri, there delivering them in the original car to the defendant company, which continued and completed the transportation to St. Joseph, Missouri. The defendant had no knowledge of the kind of cattle being shipped, and no information as to the origin of the shipment except as it was advised by the waybills.

The court commented upon the failure to prosecute the initial carrier, which apparently had been guilty of an intentional violation of the law, but why it was not proceeded against does not appear.

In reaching the conclusion that the defendant was not guilty, the court did not consider sections 3 and 4 of the law at all, and in construing section 2, which alone it took into account, left quite out of view the purposes of the law. Indeed, after eliminating all the sections of the law save one, the remaining section is not fully quoted, and it is not surprising that after so much and such severe surgery there is little life left in the law. The court thus states the statute, as it applies to railroad companies:

> "That no railroad company . . . shall receive for transportation . . . from any quarantined state or territory, etc., into any other state or territory . . . any cattle or other live stock, except as hereinafter provided."

Upon the statute thus stated the court comments (p. 885):

> It is only the railroad company that receives "for transportation from any quarantined state into any other state or territory any cattle or other live stock" that may be guilty of a misdemeanor provided for in the sixth section of the act. Such transportation, as applied to the situation under consideration, must be interstate to give jurisdiction to this court over the offense. It was the Missouri, Kansas & Texas Railway Company that received the cattle in the State of Oklahoma for transportation. It crossed the line with the cattle, bringing them through the States of Oklahoma and Kansas into Kansas City, Mo.,

> where the car was transferred by it to the defendant, which only carried the car from Kansas City to St. Joseph, within the state of Missouri.

But the statute, section 2, limited to railroads, in fact, reads:

> That no railroad company : . . shall receive for transportation *or transport* from any quarantined State or Territory . . . into any other State or Territory . . . any cattle or other live stock, except as hereinafter provided. (33 Stat. 1264).

Receiving cattle for transportation from Oklahoma to Missouri may well be said to be the act only of the initial carrier, but transporting them from Oklahoma to Missouri, when that requires passage over two lines of railroad, operated by two companies, is an act participated in by them both and which could not be completed except by their cooperation.

The court proceeds (pp. 885, 886):

> The succeeding clause of section 2 of the statute is as follows:
>
> "Nor shall any person, company or corporation deliver for such transportation to any railroad company, etc., nor shall any person, company or corporation drive on foot or cause to be driven on foot, or transport in private conveyance or cause to be transported in private conveyance from a quarantine state or territory, etc., into any other state or territory, etc., any cattle or other live stock, except as hereinafter provided."

Thus again indicating that only the person, company, or corporation that drives or causes to be driven or transported in private conveyances, etc., such live stock "from a quarantine state, etc., into another state, etc., any cattle or other live stock," is subjected to punishment by the statute. Nothing whatever is expressed by the statute respecting the liability of any connecting carrier or driver of the cattle after they pass beyond the quarantine district into another state or territory. Suppose that the shipment in question had been from Maud, Okl., to Chicago, and been carried by the Missouri, Kansas & Texas Railway Company in its car through the States of Kansas, Missouri, and Illinois, with the car not placarded and the waybill just as the one in question, would there have been more than one offense? The only offense for which it could have been indicted would have been for shipping the cattle from the state of Oklahoma into another state without complying with the regulations of the Department of Agriculture. The offense was completed by the last-named act the moment it crossed the line between Oklahoma and Kansas. Can it make any difference, under the language of the statute, that after the Missouri, Kansas & Texas Railway Company got across the line into Kansas it turned over the transportation of the car for carriage to its destination to another carrier? The statute has neither in terms nor spirit subjected both the carrier that brought the cattle out of Oklahoma into Missouri and the connecting

carrier, who completes the unfinished part of the transportation inside of the latter state, to punishment.

Undoubtedly in the case supposed by the court the Missouri, Kansas and Texas Railway Company would be guilty of but one offense, for the transportation of the cattle was but one act or transaction and participated in by but one carrier. And this offense was in a sense complete when the company brought the cattle into Kansas from Oklahoma without the required placarding and billing, even though thereafter and before reaching Chicago it did comply with the regulations. A man driving for ten miles over a highway upon which the rate of speed is restricted violates the law if he drives for the first mile at a prohibited rate, and if he so drives for the entire ten miles he continues his offense, but he does not multiply it by ten. As this court said in the *Snow* case (120 U. S., 274, l. c. 284), "it is but one entire offense, whether longer or shorter in point of duration." Acts continuous in their nature, as the exercise of a trade or calling, in violation of law, or the maintenance of a nuisance, constitute but one offense, no matter how protracted the offending, unless the law itself provides, as it may, for more. So the Missouri, Kansas and Texas Railway Company would be guilty of but one offense though it disregarded the quarantine throughout the transportation of the cattle, and it would have been equally guilty if it disregarded the quarantine for any portion of the way.

The baker who kept open his shop on Sunday was guilty of but one offense, although he kept it open all day and sold many loaves of bread. His offense, too, was complete, in a way, when he sold his first loaf. He continued, but did not multiply it. If, however, he had conducted the shop in the morning and called in his son to attend it in the afternoon, the son would also have been guilty. The act of keeping the shop open on Sunday, considered as an offense, would now not be single and indivisible, or, if so, still as it was a misdemeanor, all who participated in it would be guilty as principals.

The court assumes that because there was a completed offense when the Missouri, Kansas and Texas Railway Company crossed the State line with the cattle there could be no farther offending with respect to them by anybody, not even by the Missouri, Kansas and Texas Company.

The baker offended with every loaf of his bread that he sold on the Sunday, none the less that he could be convicted and punished for but one offense. The charge against him, although single, could be supported by proof of any sale made by him, and also by proof of several of his sales, or by proof of all of them.

So the railroad company would continue to offend every mile it progressed, without placarding the car, even though it incurred no further penalties.

This must be so, unless the law restricts the application of the quarantine regulations to the portion of the shipment from the point of origin in the quar-

antined State to the crossing of the adjoining State line.

If, however, the quarantine regulations apply to the interstate shipment in its entirety, then there may be as many offenders against the law as there are carriers concerned in the shipment. The vice of the adverse decisions in the district court is that they cut in two both the law and the shipment, and deal with but a half of each.

The last case is that of *The United States* v. *The Southern Railway Company* (187 Fed., 209).

Here the entire act was taken into consideration, and the shipment, a through one, from New Market, Alabama, to Greenville, South Carolina, was dealt with as one continuous act of interstate transportation, and, it having been made in violation of the regulations of the Secretary, the connecting carrier as well as the initial carrier was held to be guilty.

And considering the statute in its entirety and the purposes for which it was enacted, the court had no doubt that it was applicable to an interstate shipment of live stock from the place of origin to the place of destination.

As a part of the statute, too, we must take into consideration the regulations made under it. These are as to sheep in a district quarantined for scabies, that if inspected and found free from disease and from exposure to it, they may be shipped out of the State on the certificate of the inspector. If found diseased they must, as a condition of being shipped, be dipped once if intended for immediate slaughter

and twice if intended for feeding or stocking purposes. If they are not diseased, but have been exposed, they may be shipped without dipping for immediate slaughter, and after one dipping for feeding or stocking purposes.

Section 32 then provides for the mode of shipping and prescribes the duties of the carriers. The sheep must be billed for what they are—"dipped scabby sheep" or "exposed sheep for slaughter." This must be shown on all the waybills, manifests, etc. The car containing the sheep must be placarded to show the kind of sheep it contains, the placard and the lettering upon it to be of a prescribed size. The section concludes:

> Whenever such shipments are transferred to another transportation company or into other cars or into other boats, or are rebilled or reconsigned to a point other than the original destination the cars into which said sheep are transferred and the new waybills, conductors' manifests, memoranda, and bills of lading covering such shipments by cars or boats shall be marked as herein specified for cars first carrying said sheep and for the billing, etc., covering the same. If for any reason the placards required by this regulation are removed from the car or are destroyed or are rendered illegible, they shall be immediately replaced by the transportation company or its agents, *the intention being that legible placards shall be maintained on the cars from the time of shipment until they arrive at destination, and the disposition of the cars is indicated by an inspector of the Bureau of Animal Industry.*

This regulation and all the others apply of course only to interstate shipments.

Certainly it was competent for Congress to authorize a regulation which was operative from the beginning to the end of the shipment. In support of this it is not necessary to more than refer to cases like *Leisy* v. *Hardin* (135 U. S., 100), and *Kelley* v. *Rhoads* (188 U. S., 1), or, indeed, to any of the many cases that have dealt with the question of when interstate commerce begins and when it ends.

The intention of the framers of the law was to authorize such a regulation, for the report of the House Committee says:

> It is therefore obvious that contagious diseases of live stock cannot be stamped out if animals which have been exposed and which are capable of communicating the infection, but which are not themselves actually diseased, can be trailed or shipped from State to State without restriction. As the law stands at present, any person may trail or ship cattle or sheep from a Western or Southern State to the State of Illinois, *spreading infection in every State through which the cattle pass*, and yet, unless the Government can show both that the cattle were not only infected but actually diseased, and that the person moving them knew them to be diseased, no penalty can be imposed by the Federal Government.

As tending to control and eradicate the contagious diseases of animals *in the United States*, they recommend the law in question. They meant to exert

the full power of Government, limited at best in a case like this, and so extended the regulations authorized by section 3 to "the movement of cattle from a quarantined State or Territory into *any other State or Territory.*"

The purpose of the act absolutely required regulations of the scope of those adopted by the Secretary; that is, attending upon the shipment from beginning to end. Certain diseases of animals, as here scabies, are communicable. The purpose of the act is to prevent the spread of this disease through the channels of interstate commerce. If the sheep are diseased they will carry contagion wherever they go. If they have been exposed even though they themselves escape the disease they may still spread the germs of contagion. The danger does not cease when the first State line is crossed, but continues as long as the infection lasts. The cattle shipped from Maud, Okla., to St. Joseph, Mo., if they were infected with Texas fever did not lose that infection by crossing the line that marks the division of territory between Oklahoma and Kansas. And the sheep in the present case were not cleansed of contagion by delivery from the initial carrier to the Baltimore and Ohio Southwestern Company for transfer to the Union Stock Yards. This was the time, above all others, when precaution should be taken. As diseased or exposed sheep they should be taken to the quarantined yard, and not to the general yard where they would be brought into contact with hundreds or thousands of uninfected cattle.

We respectfully submit that the law does accomplish what its authors intended and what its efficiency requires.

Section three of the law provides:

> That it shall be the duty of the Secretary of Agriculture, and he is hereby authorized and directed, when the public safety will permit, to make and promulgate rules and regulations which shall permit and govern the inspection, disinfection, certification, treatment, handling, and method and manner of delivery and shipment of cattle or other live stock from a quarantined State or Territory or the District of Columbia, and from the quarantined portion of any State or Territory or the District of Columbia, into any other State or Territory or the District of Columbia; and the Secretary of Agriculture shall give notice of such rules and regulations in the manner provided in section two [one] of this Act for notice of establishment of quarantine.

It was said in *Rhodes* v. *Iowa* (170 U. S., 412, l. c. 422), that "the subtle signification of words and the niceties of verbal distinction furnish no safe guide for construing the act of Congress. On the contrary, it should be interpreted and enforced by the light of the fundamental rule of carrying out its purpose and object, of affording the remedy which it was intended to create, and of defeating the wrong which it was its purpose to frustrate." The present statute is so plain that no subtlety or nicety of verbal distinction can obscure its meaning. The regulations authorized

by section 3 are to govern the "delivery and shipment of cattle or other live stock from a quarantined State or Territory or the District of Columbia * * * into any other State or Territory or the District of Columbia." This means not simply the delivery *for* shipment, which would confine it to the initial carrier, but the *delivery and shipment.* It is not merely the shipment *from a quarantined State* that is regulated, but also the shipment *into another State,* and the other State is not restricted to an adjacent State, but includes *any* State of the Union.

The statute deals with the shipment always as an entirety, and always as "from any quarantined State" and "into any other State." Five times the movement or shipment which is the subject of regulation is described in the statute and always in terms of "from any quarantined State" and "into any other State."

The shipment is in fact as well as in law an indivisible thing. There can be no shipping from one jurisdiction without shipping into another. And the important phase of this entire and indivisible thing is the shipping or moving "into any other State." The disease exists in the quarantined State and the purpose is to keep it from spreading "into any other State," near or far. What an absurd thing to impute to the law, that it prescribes precautions to be observed while moving within the quarantined State where the disease already exists, but which may be disregarded the moment the line is crossed and a State is reached in which the disease does not exist, but into

which it may be carried if the precautions are neglected. And yet that is the result if the two cases decided by the District Courts adversely to the Government were correctly decided. If in the case of *United States* v. *C., B. & Q. R. R. Co., supra,* the offense, and the only offense possible under the act, was complete "the moment it (the shipment) crossed the line between Oklahoma and Kansas," and so, as a consequence, no succeeding and connecting carrier could be guilty of any offense, then by the same token the original or initial carrier could not be guilty of any offense of omission or commission after it had crossed the line. So if the placard had been removed or destroyed or rendered illegible, there would not be upon it any obligation to obey the requirement of regulation 32, that it "be immediately replaced by the transportation company or its agents." More than this, the initial carrier, when it crossed the State line, might strip the placard from the car and change its waybills, moving the shipment thenceforth as one neither diseased nor exposed to disease. A convenient law this would be for unscrupulous carriers and shippers, but it would fail in every purpose of its enactment.

No case of interstate shipment can be imagined in which there is such requirement that the shipment be regarded as an unbroken transaction from beginning to end as where quarantine is involved. The greater the distance of shipment the greater the danger of spreading disease. Stock moving from a

quarantined State to an adjacent State might not be unloaded and yarded *en route* at all. It would be a source of danger only at its destination. But stock going through many States must be unloaded and yarded every twenty-eight hours, and at each place where this was done a center of infection would be established. And so to limit the quarantine regulations to the mere crossing of the first State line is to strike them down altogether and the law as well.

The District Court construed this law as the bourgeois of Falaise construed the order of the city authorities requiring anyone out at night to carry a lantern. The bourgeois, upon being arrested for a violation of this order, exhibited a lantern. "But," said the officer, "there is no candle in your lantern." He replied, "The order said nothing about a candle." He was admonished that a lantern without a candle was useless for the purposes of the order and permitted to go his way. The next night he was arrested again, and now he exhibited a lantern with a candle in it. "But," said the officer, "the candle is not lighted." "And," replied the bourgeois, "there was nothing in the order or the admonition requiring the candle to be lighted."

In the narrow spirit of the bourgeois has this law been construed. The requirement of a lantern in the night is of one trimmed and burning and lighting up the darkness, and so to construe the requirement is not to add anything to it, but only to give effect to it. To extend the quarantine regulations provided for by

this act to the entire course of an interstate shipment of diseased or exposed cattle or sheep adds not a word to the act nor takes a word from it, but only gives to the words employed the effect which it is manifest they were intended to have.

It is respectfully submitted that the judgment of the District Court should be reversed.

F. W. LEHMANN,
Solicitor General.

JULY, 1911.

APPENDIX.

A.

Act of March 3, 1905, 33 Stat., 1264, "To enable the Secretary of Agriculture to establish and maintain quarantine districts, to permit and regulate the movement of cattle and other live stock therefrom, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of Agriculture is authorized and directed to quarantine any State or Territory or the District of Columbia, or any portion of any State or Territory or the District of Columbia, when he shall determine the fact that cattle or other live stock in such State or Territory or District of Columbia are affected with any contagious, infectious, or communicable disease; and the Secretary of Agriculture is directed to give written or printed notice of the establishment of quarantine to the proper officers of railroad, steamboat, or other transportation companies doing business in or through any quarantined State or Territory or the District of Columbia, and to publish in such newspapers in the quarantined State or Territory or the District of Columbia, as the Secretary of Agriculture may select, notice of the establishment of quarantine.

SEC. 2. That no railroad company or the owners or masters of any steam or sailing or other vessel or boat shall receive for transportation or transport from any quarantined State or Territory or the District of Columbia, or from the quarantined portion of any State

or Territory or the District of Columbia, into any other State or Territory or the District of Columbia, any cattle or other live stock, except as hereinafter provided; nor shall any person, company, or corporation deliver for such transportation to any railroad company, or to the master or owner of any boat or vessel, any cattle or other live stock, except as hereinafter provided; nor shall any person, company or corporation drive on foot, or cause to be driven on foot, or transport in private conveyance or cause to be transported in private conveyance, from a quarantined State or Territory or the District of Columbia, or from the quarantined portion of any State or Territory or the District of Columbia, into any other State or Territory or the District of Columbia, any cattle or other live stock, except as hereinafter provided.

SEC. 3. That it shall be the duty of the Secretary of Agriculture, and he is hereby authorized and directed, when the public safety will permit, to make and promulgate rules and regulations which shall permit and govern the inspection, disinfection, certification, treatment, handling, and method and manner of delivery and shipment of cattle or other live stock from a quarantined State or Territory or the District of Columbia, and from the quarantined portion of any State or Territory or the District of Columbia, into any other State or Territory or the District of Columbia; and the Secretary of Agriculture shall give notice of such rules and regulations in the manner provided in section two [one] of this Act for notice of establishment of quarantine.

SEC. 4. That cattle or other live stock may be moved from a quarantined State or Territory or the District of Columbia, or from the quarantined

portion of any State or Territory or the District of Columbia, into any other State or Territory or the District of Columbia, under and in compliance with the rules and regulations of the Secretary of Agriculture, made and promulgated in pursuance of the provisions of section three of this Act; but it shall be unlawful to move, or to allow to be moved, any cattle or other live stock from any quarantined State or Territory or the District of Columbia, or from the quarantined portion of any State or Territory or the District of Columbia, into any other State or Territory or the District of Columbia, in manner and method or under conditions other than those prescribed by the Secretary of Agriculture.

* * * * *

SEC. 6. That any person, company, or corporation violating the provisions of sections two or four of this Act shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment.

B.

House Report No. 4200, Fifty-eighth Congress, third session.

QUARANTINE DISTRICTS FOR LIVE STOCK.

FEBRUARY 3, 1905.—Referred to the House Calendar and ordered to be printed.

Mr. HASKINS, from the Committee on Agriculture, submitted the following report:

[To accompany H. R. 17589.]

The Committee on Agriculture, having had under consideration the bill (H. R. 17589) to enable the Secretary of Agriculture to establish and maintain quarantine districts, to permit and regulate the movement of cattle and other live stock therefrom, and for other purposes, respectfully submit the following report with the recommendation that the bill do pass:

The existing law having reference to quarantine of live stock in infected districts, and for the suppression and extirpation of contagious, infectious, and communicable diseases in live stock, is embodied in the act of May 29, 1884 (23 Stat. L., 30), and the act of February 2, 1903 (32 Stat. L., pt. 1, 791).

The first-named act is that providing for the establishment of the Bureau of Animal Industry. The first two sections thereof have reference to organization.

Section 3 provides for the cooperation of the Commissioner of Agriculture and the State and Territorial authorities for the suppression and extirpation of

diseases in animals. That is, in order that the law become effective, the rules and regulations promulgated by the Commissioner of Agriculture must be accepted by the State or Territorial authorities, or the plans and methods adopted by the State or Territory must be accepted by the Commissioner of Agriculture. And it was only by such agreed cooperation that the Commissioner of Agriculture was authorized to expend such portion of the money appropriated under said act as he might deem necessary in the suppression and extirpation of diseases of live stock.

Section 4 provides that, to promote exportation of live stock, the Commissioner of Agriculture is authorized to make special investigation as to the existence of pleuro-pneumonia or any other contagious or communicable disease, reporting the results of his investigation to the Secretary of the Treasury, who, from time to time, was authorized to establish such regulations concerning the exportation and transportation of live stock as the results of said investigation might require.

Section 5 authorizes the Secretary of the Treasury, in order to prevent the exportation of diseased live stock from any part of the United States, to take such steps and adopt such measures as he might deem necessary, not inconsistent with said act.

Section 6 is a prohibition upon railroad companies, owners, or masters of steam or sailing vessels from receiving for transportation from one State or Territory to another, or into the District of Columbia, live stock affected with any contagious disease, and especially that of pleuro-pneumonia; or any person, company, or corporation from delivering to such railroad

or transportation company any live stock, knowing the same to be affected with any contagious, infectious, or communicable disease; or any person, company, or corporation to drive on foot or to transport in private conveyance, from one State or Territory to another, live stock, knowing the same to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuropneumonia.

Section 7 provides for the notification by the Commissioner of Agriculture to transportation companies and persons doing business in infected districts by notice in writing and by publication of the existence of said contagion; that any person or persons operating a transportation company, or persons having control of live stock in said infected districts, who shall knowingly violate the provisions of section 6 shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than $100 or more than $5,000, or by imprisonment for not more than one year, or by both, in the discretion of the court.

Section 1 of the act of February 2, 1903, transferred the powers conferred on the Secretary of the Treasury by section 4 of the first-mentioned act to the Secretary of Agriculture, including among the contagious diseases that known as the foot-and-mouth disease. And it authorized the Secretary of Agriculture from time to time to establish such rules and regulations concerning the exportation and transportation of live stock from any place in the United States when he had reason to believe such diseases existed into and through any State or Territory, including the Indian Territory, and into and through the District of Columbia, and to foreign countries, as he might

deem necessary, "and all such rules and regulations shall have the force of law."

Section 2 authorizes the Secretary of Agriculture to make all necessary regulations and to take such measures as he might deem proper to prevent the introduction or dissemination of the contagion, or of any contagious, infectious, or communicable diseases by animals from a foreign country into the United States, or from one State or Territory to another, and to seize, quarantine, and dispose of, etc., when in his judgment such action is advisable.

Section 3 imposes a fine of not less than $100, or not more than $1,000, or imprisonment for not more than one year, or both, as a penalty for the violation of the rules and regulations promulgated by the Secretary of Agriculture, such violation being declared a misdemeanor.

It has been found that both of the aforesaid acts are defective in their provisions, and are wholly inadequate to accomplish the purposes which Congress had in view at the time they were enacted. The Supreme Court of the United States in the case of Reid *v.* Colorado (187 U. S., 137) declared that the act of May 29, 1884, conferred power upon the Secretary of Agriculture to institute quarantine measures only when the State affected had adopted the measures of the Bureau of Animal Industry or when the Bureau of Animal Industry had approved the measures of the State looking to the suppression and extirpation of contagious diseases.

Regarding the interstate movement of cattle, the Supreme Court in the same case said:

"Congress went no further than to make it an offense against the United States for anyone knowingly to take or send from one State or Territory to

another State or Territory, or into the District of Columbia or from the District into any State, live stock affected with infectious or communicable diseases. The animal-industry act did not make it an offense against the United States to send from any State into another live stock which the shipper did not know were diseased."

The case of the United States *v.* Slater, reported in 123 Federal, page 115, takes the same view of the act of 1884. In the case of the United States *v.* Alex. Hoover, an unreported case, in the district court of Nebraska, the court, after quoting a portion of the opinion of the Supreme Court in the case of Reid *v.* Colorado, said:

"The act of Congress, then, being limited to cases where the animals were affected with an infectious or communicable disease, it was not within the power or authority of the Secretary of Agriculture to extend the act and by an order or regulation bring within its penal provisions matters which were not criminal by the terms of the act."

From the aforesaid cases it seems to be well settled that to constitute an unlawful movement of cattle from State to State, under the act of 1884, two elements must concur, viz, (1) the cattle must be diseased; (2) the person moving them must know that they are diseased. Consequently, under this act exposed cattle, or cattle which are diseased but which the shipper does not know are diseased, may be moved with entire freedom from prosecution, and there is no affirmative provision in the law compelling the shipper to submit his cattle to inspection before shipment in order to form an intelligent opinion as to whether or not they are in fact diseased.

After the decision of the Supreme Court in the case of Reid *v.* Colorado had been handed down it was felt that the act of May 29, 1884, was defective, and the act of February 2, 1903, was passed. As will be seen, this latter act transferred certain powers vested in the Secretary of the Treasury to the Secretary of Agriculture.

The authority contained in this act for the Secretary of Agriculture to make rules and regulations concerning the interstate movement of live stock and providing that these rules and regulations shall have the force and effect of law is, on its face, a very broad provision, and it is believed that it was the intention of Congress thereby to place in the hands of the Secretary of Agriculture absolute control of the interstate movement of all cattle, whether diseased or clean, coming from infected territory, in order to extirpate contagious diseases of animals. Acting under the provisions of the act of February 2, 1903, the Secretary of Agriculture has, from time to time, issued various rules and regulations quarantining and regulating the movement of both diseased and exposed animals from certain affected localities. Violations of these rules and regulations have occurred, and in attempting to secure the punishment of the guilty persons through the courts it has been found that it is settled law that the rules and regulations of an administrative officer may not go beyond the statute under which the rules and regulations are issued. In other words, as was stated by the supreme court of Arizona in the case of Dent *v.* United States (71 Pacific, 920):

"The act of June 4, 1897 (30 Stat. L., 33), is an unconstitutional delegation of legislative power to the Secretary of the Interior in so far as it authorizes him

to specify that the performance of certain acts shall constitute a crime."

In the case of the United States *v.* Alex. Hoover, above referred to, the court said, referring to the act of February 2, 1903:

"The act nowhere attempts to prohibit the shipment of animals which are free from disease, and if Congress intended to empower the Secretary of Agriculture to make rules and regulations, the violation of which alone should constitute a crime, it was an unconstitutional delegation of legislative authority. While Congress may authorize the executive head of any department of the Government to make binding rules and regulations which are administrative in character, it can not delegate the authority to make laws."

It is therefore obvious that contagious diseases of live stock can not be stamped out if animals which have been exposed and which are capable of communicating the infection, but which are not themselves actually diseased, can be trailed or shipped from State to State without restriction. As the law stands at present, any person may trail or ship cattle or sheep from a Western or Southern State to the State of Illinois, spreading infection in every State through which the cattle pass, and yet, unless the Government can show both that the cattle were not only infected but actually diseased, and that the person moving them knew them to be diseased, no penalty can be imposed by the Federal Government.

If contagious diseases of animals are to be controlled and eradicated in the United States, it is respectfully submitted that the following additional legislation is needed:

1. Power to declare a quarantine of any State or Territory or any portion of any State or Territory where the existence of contagious diseases of cattle or other live stock is proven, due notice to be given of the establishment of quarantine to transportation companies and to the general public. This is covered by the first section of the proposed bill. Of course, if a portion of a State were quarantined, cattle could be moved from the quarantined portion of that State to any other part of the same State and the jurisdiction of the Federal Government would not attach.

2. A provision that no cattle or other live stock shall be moved from a quarantined State or Territory to any other State or Territory except under certain prescribed conditions. This is covered by section 2 of the proposed bill.

3. Direction to and authority in the Secretary of Agriculture to make rules and regulations under certain conditions governing and permitting the movement of cattle from a quarantined State or Territory to any other State or Territory, with due provision for promulgation of notice of these regulations and conditions to interested parties and to the general public. This is covered by section 3 of the proposed bill.

4. Providing that it shall be unlawful to move cattle or other live stock from a quarantined State or Territory into any other State or Territory except in the manner prescribed by the rules and regulations of the Secretary of Agriculture. This is provided for in section 4 of the proposed bill.

5. Imposing a heavy penalty for an assault or attack with a deadly weapon upon an inspector of the Bureau of Animal Industry while said inspector is engaged in the performance of his official duty.

This provision is very necessary. During the past year two vicious, deadly, and unprovoked assaults have been made upon inspectors engaged in the performance of their official duties, and it was found that no statute existed under which the perpetrators could be proceeded against in the Federal courts. This is provided for in section 5 of the proposed bill.

6. Imposing a penalty for the violation of the provisions of sections 2 and 4 of the proposed bill. This is covered by the last section.

C.

REGULATIONS TO PREVENT THE SPREAD OF SCABIES IN SHEEP.

Effective April 15, 1907.

REGULATION 29. No sheep which are diseased with scabies shall be shipped, trailed, otherwise removed, or allowed to drift from one State, Territory, or the District of Columbia, into another State, Territory, or the District of Columbia, except as hereinafter provided; and no sheep shall be shipped, trailed, otherwise removed, or allowed to drift from a State or Territory or portion thereof quarantined for the disease of scabies in sheep into another State, Territory, or the District of Columbia, except as hereinafter provided, until the sheep shall have been inspected by an inspector of the Bureau of Animal Industry, found to be free from the disease and from exposure thereto, and are accompanied by a certificate from the said inspector. All of the sheep in a certain flock or shipment in which the disease is present shall be classed as diseased sheep, and none of them shall be removed or offered for interstate shipment until dipped as hereinafter provided. The practice of "picking" a flock—i. e., removing sheep which are visibly diseased and then offering any portion of the remaining sheep for either inspection or interstate shipment, or both—is directly and positively prohibited.

REGULATION 30. Healthy sheep in an area not quarantined for the disease of scabies in sheep which have not been exposed to the disease may be shipped or trailed interstate without restriction by the regulations of the Secretary of Agriculture to prevent the spread of scabies in sheep; but if said sheep be unloaded en route or at destination and are placed in infectious premises they shall thereafter be treated as exposed sheep and shall not be forwarded to destination for purposes other than immediate slaughter until they shall have been dipped under the supervision of an inspector of the Bureau of Animal Industry.

REGULATION 31. Sheep that are diseased with scabies and that have been dipped once in one of the approved dips, under the supervision of an inspector of the Bureau of Animal Industry within ten days of date of shipment, may be shipped interstate for immediate slaughter to a recognized slaughtering center, and when so shipped the said sheep shall not be diverted en route and shall be slaughtered within two weeks after arrival at destination. If diseased sheep are to be shipped interstate for stocking or feeding purposes they shall be dipped twice as above indicated, ten days apart, and shall be submitted to inspection before shipment.

Sheep that are not diseased with scabies, but which have been exposed to the contagion of the disease, may be moved interstate for feeding or stocking purposes after one dipping, or they may be shipped interstate by rail or boat to a recognized slaughtering center for immediate slaughter without dipping.

REGULATION 32.—When diseased sheep have been dipped once and are shipped interstate for slaughter in accordance with Regulation 31, or when exposed

sheep are shipped interstate without dipping for immediate slaughter in accordance with Regulation 31, the proper officers of the transportation company shall affix to both sides of each car a durable placard not less than 5½ by 8 inches in size, on which shall be printed with permanent black ink in bold-face letters not less than 1½ inches in height the words "DIPPED SCABBY SHEEP" or "EXPOSED SHEEP FOR SLAUGHTER," as the case may be. These placards shall also show the name of the place from which the shipment was made, the date of the shipment (which must correspond with the date of the waybills and other papers), the name of the transportation company, and the name of the place of destination. Each of the waybills, conductors' manifests, memoranda, and bills of lading pertaining to such shipments by cars or boats shall have the words "DIPPED SCABBY SHEEP" or "EXPOSED SHEEP FOR SLAUGHTER," as the case may be, written or stamped upon its face. Whenever such shipments are transferred to another transportation company or into other cars or into other boats, or are rebilled or reconsigned to a point other than the original destination the cars into which said sheep are transferred and the new waybills, conductors' manifests, memoranda, and bills of lading covering such shipments by cars or boats shall be marked as herein specified for cars first carrying said sheep and for the billing, etc., covering the same. If for any reason the placards required by this regulation are removed from the car or are destroyed or rendered illegible, they shall be immediately replaced by the transportation company or its agents, the intention being that legible placards shall be maintained on the cars from the time of shipment until they arrive at destination, and the disposition of the cars

is indicated by an inspector of the Bureau of Animal Industry.

REGULATION 33.—The dips now approved are:

(*a*) The tobacco-and-sulphur dip, made with sufficient extract of tobacco or nicotine solution to give a mixture containing not less than five one-hundredths of 1 per cent of nicotine and 2 per cent flowers of sulphur: *Provided*, That for the first dipping of infected sheep, in lieu of the sulphur herein prescribed, a sufficient additional amount of extract of tobacco or nicotine solution shall be used to give a mixture containing not less than seven one-hundredths of 1 per cent of nicotine.

(*b*) The lime-and-sulphur dip, made by mixing 8 pounds of unslaked lime and 24 pounds of flowers of sulphur and boiling with 30 gallons of water for not less than two hours. All sediment should be allowed to subside before the liquid is placed in the dipping vat. This liquid should be diluted sufficiently to make 100 gallons before use;

And pending further investigation, the following-described dips:

(*c*) The cresol dip, which consists of a mixture of cresylic acid [a] with soap. When diluted ready for use this dip should contain one-half of 1 per cent of cresylic acid.

(*d*) The coal-tar creosote dip, which is made by mixing coal-tar creosote or coal-tar oils and cresylic acid separately with resin soap in varying proportions. This dip should contain when diluted ready for use not less than 1 per cent by weight of coal-tar oils and cresylic acid. In no case should the diluted dip

[a] By the term cresylic acid as used in these regulations is meant cresols and other phenols derived from coal tar, none of which boils below 185° C. nor above 250° C.

contain more than four-tenths of 1 per cent nor less than one-tenth of 1 per cent of cresylic acid; but when the proportion of cresylic acid falls below two-tenths of 1 per cent the coal-tar oils should be increased sufficiently to bring the total of the tar oils and the cresylic acid in the diluted dip up to 1.2 per cent by weight.

The cresol dip and the coal-tar creosote dip should always be tested on a small scale with the water and under the conditions to be employed in dipping in order to avoid possible injury to stock. The diluted sample should be allowed to stand for at least an hour. If after this length of time there is a separation of an oily layer the dip should not be used with that kind of water. Especial care in this connection is necessary where hard water is to be used.

In the undiluted coal-tar creosote dips there may be, in cold weather especially, a separation of naphthalene and other constituents of the dip. Care should therefore be taken to see that the concentrated dip is homogeneous in character before using any portion of it.

Manufacturers who desire the Department to approve their dips for official dipping should submit a sample of their product to the Bureau of Animal Industry in Washington and accompany this with the formula used in preparing the dip.

Before a proprietary substance is approved for use in official dipping the manufacturer must agree as follows:

(1) To recommend for sheep scab a dilution of his product which is approved by the Department of Agriculture.

(2) To maintain his product of uniform composition.

(3) To place on packages of dips which have been approved the following statement:

A sample of this product has been submitted to the Department of Agriculture for examination. We guarantee the contents of this package to be of the same composition as the sample submitted to the Department, and that when diluted according to the directions printed hereon for the treatment of sheep scab it will give a dipping fluid of the composition required of a ———[a] dip by the regulations of the Secretary of Agriculture governing sheep scab.

(4) To have on containers or advertising matter no reference to the United States Government or any of its Departments except as provided in the preceding paragraph.

REGULATION 34. The dipping shall be done carefully and the sheep handled as humanely as possible. The Department disclaims responsibility for any loss or damage resulting from the dipping, and those who wish to avoid any risks that may be incident to dipping at the stock yards, as well as to avoid liability to prosecution, should see that their sheep are free from disease before shipping them to market.

REGULATION 35. Sheep shipped interstate under a certificate from an inspector of the Bureau of Animal Industry are not guaranteed uninterrupted transit; for in the event of the discovery of scabies or of exposure thereto en route the sheep shall thereafter be handled as diseased or exposed sheep, as hereinbefore provided, and the cars or other vehicles and the chutes, alleys, and pens which have been occupied by them shall be cleaned and disinfected, as hereinafter provided.

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[a] There should be inserted here the name of the class of dips to which the product belongs, such as "cresol" or "lime and sulphur," etc.

REGULATION 36. Public stock yards shall be considered infectious and the sheep yarded therein as having been exposed to the disease, and no sheep shall be shipped interstate therefrom, except for immediate slaughter, without dipping. Where, however, a part or all of the stock yards is reserved and set apart for the reception of uninfected shipments of sheep and is kept free of disease, sheep may be shipped interstate from the uninfectious yards or portions thereof without dipping. If diseased sheep are introduced into the uninfectious yards or portions thereof, they shall be immediately removed therefrom and the chutes, alleys, and pens occupied by the said sheep shall be thoroughly cleaned and disinfected. No sheep shall be shipped interstate for feeding or stocking purposes from any stock yards where an inspector of the Bureau of Animal Industry is stationed without a certificate of inspection or of dipping issued by the said inspector.

REGULATION 37. Cars and other vehicles, yards, pens, sheds, chutes, etc., that have contained diseased sheep shall be cleaned and disinfected in the following manner: Remove all litter and manure and then saturate the interior surfaces of the cars and the woodwork, flooring, and ground of the sheds, alleyways, and pens with a solution containing 5 per cent of pure carbolic acid or with a solution containing 2 per cent of cresol. When cresol is used it must be mixed with soft soap in order to render it easily soluble in cold water. Cars and premises are not required to be cleaned and disinfected on account of their having contained "dipped scabby sheep" that have been dipped within ten days or sheep that have been exposed to scabies. In determining exposure, all sheep in a flock or shipment in which disease is present shall be classed as diseased.

D.

(Amendment 4 to
B. A. I. Order 146.)

United States Department of Agriculture,

BUREAU OF ANIMAL INDUSTRY.

AMENDMENT 4 TO RULE 3, REVISION 1.—TO PREVENT THE SPREAD OF SCABIES IN SHEEP.

Effective on and after August 16, 1909.

UNITED STATES
DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY.

The fact has been determined by the Secretary of Agriculture, and notice is hereby given, that a contagious, communicable disease known as scabies exists among sheep in the State of Kentucky.

Now, therefore, I, JAMES WILSON, SECRETARY OF AGRICULTURE, under authority conferred by section 1 of the act of Congress approved March 3, 1905 (33 Stat., 1264), do hereby quarantine the following area, to wit:

All territory situate within the boundaries of the State of Kentucky.

It is ordered by this Amendment 4 to Rule 3, Revision 1, under the authority and discretion conferred upon the Secretary of Agriculture by section 3

of the act of Congress approved March 3, 1905 (33 Stat., 1264), that sheep in the State of Kentucky shall be moved therefrom to any other State or Territory or District only in accordance with Regulations 31 to 37, inclusive, of the regulations of the Secretary of Agriculture designated as B. A. I. Order 143, promulgated March 22, 1907, and effective April 15, 1907, as amended, and that all inspections and dippings required under said Regulations 31 to 37, inclusive, shall be made at points where Federal inspection is maintained.

Done at Washington this fifth day of August, 1909.

Witness my hand and the seal of the Department of Agriculture.

[SEAL.]

JAMES WILSON,
Secretary of Agriculture.

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CLERK.

No. 464.

Supreme Court of the United States

OCTOBER TERM, 1911.

THE UNITED STATES,
Plaintiff in Error,

versus

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant in Error.

Error to the District Court of the United States for the Western Division of the Southern District of Ohio.

Argument for Defendant in Error.

JUDSON HARMON,
EDWARD COLSTON,
A. W. GOLDSMITH,
GEO. HOADLY,
Attorneys for Defendant in Error.

COURT INDEX PRESS, 906 Main street, Cincinnati.

Supreme Court of the United States

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THE UNITED STATES,
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Argument for Defendant in Error.

STATEMENT.

This is a writ of error brought under the act of March 2, 1907 (34 Stats. at Large, 1246), to review a decision of the District Court of the United States for the Western Division of the Southern District of Ohio quashing an indictment for insufficiency on the ground that it did not state any offense.

The indictment was for a misdemeanor under the acts of Congress of March 3, 1905 (33 Statutes at Large, 1264) and the allegations contained in the first count of the in-

dictment as to the nature of the alleged violation, the other counts being in all material respects similar to the first, are as follows (Record, pp. 2, 3 and 4):

> "That the Baltimore & Ohio Southwestern Railroad Company is a corporation organized under the laws of the states of Ohio and Indiana, and that it has an office and place of business in the city of Cincinnati, Hamilton county, Ohio, and within the jurisdiction of this court; that said the Baltimore and Ohio Southwestern Railroad Company is a common carrier of traffic and owns and operates a line of railroad in and through the state of Ohio and other states of the United States; and that said the Baltimore & Ohio Southwestern Railroad Company is a connecting common carrier, by and through which, and over whose said line of railroad interstate shipments of live stock originating in the state of Kentucky and other states of the United States and consigned for shipment to the city of Cincinnati, in the state of Ohio, and to the Union Stock Yards, in said city and state, are carried and transported to the said Union Stock Yards and to their destination at said city of Cincinnati, in the state of Ohio;
>
> "That pursuant to the act of Congress, approved March 3d, 1905 (33 Statutes, 1264), and under and by virtue of the authority therein conferred upon him, the Secretary of Agriculture of the United States, after having determined the fact that a contagious and communicable disease, known as scabies, existed among sheep in the state of Kentucky, on the 5th day of August, 1909, made and promulgated an order and regulation, known as Amendment 4 to Rule 3, Revision 1, B. A. I. Order 146, establishing a quarantine of all territory situate within the boundaries of the state of Kentucky, which

said quarantine became effective on and after the 16th day of August, 1909;

"That pursuant to and under and by virtue of the authority of said act of Congress, said Secretary of Agriculture made and issued certain 'Regulations to prevent the spread of scabies in sheep,' included in and known as B. A. I. Order 143; which said regulations and order became and were effective on the 15th day of April, 1907, and provided for, permitted and governed the inspection, disinfection, certification, treatment, handling, and the method and manner of delivery and shipment of sheep diseased as aforesaid from the quarantined state of Kentucky and other quarantined states or territories, into any other state or territory; and that the provisions and requirements of Regulations 31 to 37, inclusive, being a part of and contained in said B. A. I. Order 143, were incorporated into and made a part of the order first aforementioned, to-wit, Amendment 4 to Rule 3, Revision 1, B. A. I. Order 146, at the time said order was made, issued, and promulgated as herein set forth;

"That said Secretary of Agriculture gave notice of the establishment of said quarantine and of the making and issuance of the aforesaid orders, rules, and regulations by sending printed copies of the same to said the Baltimore & Ohio Southwestern Railroad Company, and that receipt of such notice was acknowledged by C. C. F. Bent, as general manager of said railroad company;

"That said Secretary of Agriculture gave notice of the establishment of said quarantine and of the making and issuance of the aforesaid orders, rules, and regulations, by publishing them in newspapers of general circulation in said quarantined state of Kentucky, as follows, to-wit: In 'The Frankfort *News*,' published at

Frankfort, Kentucky, in the issues of August 19th, 1909, and August 27th, 1909; in 'The Paducah Evening *Sun*,' published at Paducah, Kentucky, in the issue of August 16th, 1909; and in 'The Louisville *Herald*,' published at Louisville, Kentucky, in the issue of August 15th, 1909;

"That on August 2d, 1910, a shipment of one hundred and fifty-one (151) sheep, consigned by W. H. Lillard, at Danville, Kentucky, to Greene, Embry & Company, at Cincinnati, in the state of Ohio, was loaded into C. N. O. & T. P. car No. 9227 at Danville, in the state of Kentucky, and within the quarantined area established as aforesaid; and that said shipment of sheep, so contained in said car, was then and there delivered for transportation to the Cincinnati, New Orleans & Texas Pacific Railway Company, and was by said railway company transported and conveyed thence over its line of railroad to a point within the city of Cincinnati, in the state of Ohio, where said shipment arrived on the 3d day of August, 1910; that said shipment of sheep, contained in said car, was, at the last mentioned time and place, delivered to the Baltimore & Ohio Southwestern Railroad Company, aforesaid, to be by it transported and delivered to the consignee thereof;

"That said the Baltimore & Ohio Southwestern Railroad Company, unlawfully and in violation of the aforesaid orders and regulations of the Secretary of Agriculture, and after the issuance and promulgation of the said orders and regulations, and while the same were still in full force and effect, did then and there, at the time and place last aforementioned, receive the said shipment of sheep, contained in said car, and did transport the same over its said line of railroad to the Union Stock Yards at the city of Cincinnati, in the state of Ohio, which was then

and there the destination of said shipment of sheep;

"That said car, C. N. O. & T. P. No. 9227, containing said interstate shipment of sheep from said quarantined state of Kentucky, did not then and there have affixed to both or either of the sides of said car, or at all, placards bearing the words, 'Dipped scabby sheep,' or the words 'Exposed sheep for slaughter,' as provided in said orders and regulations of the Secretary of Agriculture; and that the way bills, conductors' manifests, memoranda, and bills of lading pertaining to said shipment of sheep did not then and there have written or stamped upon the face thereof the words 'Dipped scabby sheep,' or 'Exposed sheep for slaughter,' as required by said orders and regulations of the Secretary of Agriculture; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

A summons issued on this indictment (Record, p. 9) which was duly served on defendant (Record, pp. 9 and 10). Defendant pleaded not guilty (Record, p. 10).

Thereupon the court of its own motion quashed the indictment for the reasons set forth in the entry (Record, pp. 10 and 11), and it is to reverse this order that this writ of error is brought.

ARGUMENT.

This is a prosecution under the Act of March 3, 1905 (33 Statutes at Large, 1264), which act, so far as it bears on the question here under consideration, reads as follows:

"SEC. 2. That no railroad company * * * shall receive for transportation or transport from any quarantined state or territory * * * into any other state or territory * * * any cattle or other live stock, except as hereinafter provided," * * *.

"SEC. 4. That cattle or other live stock may be moved from a quarantined state or territory * * * into any other state or territory * * * under and in compliance with the rules and regulations of the Secretary of Agriculture, made and promulgated, in pursuance of the provisions of section three of this act; but it shall be unlawful to move, or to allow to be moved, any cattle or other live stock from any quarantined state or territory * * * into any other state or territory * * * in manner or method or under conditions other than those prescribed by the Secretary of Agriculture."

"SEC. 6. That any person, company, or corporation violating the provisions of sections two or four of this Act shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment."

This indictment charges no violation of either Section 2 or Section 4 of this act, and therefore charges no offense against the laws of the United States. The indictment shows on its face, that the sheep transported by the Baltimore & Ohio Southwestern Railroad Company were in each case received by that company at Cincinnati in the state of Ohio and were by that company transported wholly within the city of Cincinnati, and of course within the state of Ohio, to another part of that city where they were unloaded and where the transportation ended.

The statute in question is a penal statute. Of this there can be no doubt. Not only does it impose a money penalty in favor of the United States, not of a party aggrieved, but it declares that the violation of its provisions is a misdemeanor punishable by fine or imprisonment or both. The fact that this defendant being a corporation can not be imprisoned does not make the statute any the less penal.

We are aware that in *United States* v. *Southern Ry.*, 187 Fed., 209, the United States Circuit Court for the District of South Carolina said that this was a remedial statute and must receive a liberal construction, but if a statute which makes its violation a misdemeanor, which imposes a penalty of imprisonment and which permits a prosecution by indictment be remedial and not penal, the definitions of penal statutes in the cases and text-books must be revised.

In *Huntington* v. *Attrill*, 146 U. S., at page 667, this court said:

> "Penal laws, strictly and properly are those imposing punishment for an offense against the state, and which by the English and American constitutions, the executive of the state has the power to pardon."

This statute imposing as it does a punishment of fine or imprisonment or both for its violation does unquestionably make such violation an offense against the state and therefore it is "strictly and properly" a penal law.

Again in the same case this court said (p. 668):

> "The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone:

> "'Wrongs are divisible into two sorts or species: *private wrongs* and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals considered as individuals; and are thereupon frequently termed *civil injuries;* the latter one a breach and violation of public rights and duties which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors.*' 3 Bl. Com., 2."

On the same subject we also call the attention of the court to the cases cited below.

As this is a penal statute it must be strictly construed; this is required by well settled principles applicable to the construction of statutes and repeatedly recognized and approved by this court.

In *United States* v. *Sheldon*, 2 Wheat., 119, the defendant was indicted under the act of July 6, 1812, for transporting living fat oxen from the United States to Canada; the act, passed in furtherance of the then existing war with Great Britain, providing "that if any citizen of the United States should transport or attempt to transport, over land or otherwise, in any wagon, cart, sleigh, boat, or otherwise, naval or military stores, arms or munitions of war, or any articles of provision from the United States to Canada, etc., the wagon, etc., by which the said articles are transported, or attempted to be transported, together with the articles themselves, shall be forfeited; and the person aiding, or privy to the same, shall forfeit to the United States a sum equal in value to the wagon, etc., or thing by which the said articles were transported, and shall moreover be considered as guilty of a misdemeanor and liable to fine and imprisonment."

The question submitted to the court was whether living fat oxen were articles of provisions and munitions of war. The court held that they were both, under the circumstances then existing and of which the court took judicial notice.

The next question was whether the driving of living fat oxen from the United States to Canada was *transporting* them. The court held that under the strict construction required to be applied to a penal statute the driving of them was not a transporting of them, and that the defendant was entitled to judgment. The court held that the word "transport" meant to carry or convey. The language of the court is as follows (see p. 121):

> "It may be admitted, that the mischief is the same, whether the enemy be supplied with provisions in the one way or the other; but this affords no good reason for construing a penal law by equity, so as to extend it to cases not within the correct and ordinary meaning of the expressions of the law."

This is a very strong case in favor of a strict construction of a penal statute, as it will be observed that had the Government been able to allege and show that the defendant transported them with the intent they should be used by the British military authorities, he would have been indictable for treason in giving aid and comfort to the enemy, and therefore for a capital offense.

In *United States* v. *Wiltberger*, 5 Wheat., 76, at p. 95 Chief Justice Marshall said:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of

punishment is vested in the legislative, not in the judicial department. It is the Legislature, not the court, which is to define a crime, and ordain its punishment.

"It is said, that notwithstanding this rule, the intention of the law maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the Legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the Legislature has obviously used them, would comprehend. The intention of the Legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases."

In *United States* v. *Reese*, 92 U. S., 214, this court again enforced the rule that a penal statute must be strictly construed, and in that case refused to limit the operation of an act, which, as read literally, was too broad, and therefore unconstitutional, to a scope within which it would be constitutional.

In *Elliott* v. *Railroad Co.*, 99 U. S., 573, at p. 576 the court said:

> "Penalties are never extended by implication. They must be expressly imposed or they can not be enforced."

In the *Trade-Mark Cases*, 100 U. S., 82, the same rule was applied.

In *France* v. *United States*, 164 U. S., 676, this court said at p. 682:

> "Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly. * * * If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation."

In *Bolles* v. *Outing Company*, 175 U. S., 262, this court said at p. 265:

> "The statute, then, being penal, must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the Legislature. If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in favor of the

> defendant than it would if the statute were remedial. In both cases it will endeavor to effect substantial justice."

In *United States* v. *Harris*, 177 U. S., 305, this court held that a receiver of a railroad was not within the terms of Sections 4386, 4387, 4388 and 4389, Revised Statutes of the United States, and said at p. 310:

> "We can not better close this discussion than by quoting the language of Chief Justice Marshall, in the case of *United States* v. *Wiltberger*, 5 Wheat., 76." (The language thus quoted being quoted above.)

See also *Werckmeister* v. *American Tobacco Co.*, 207 U. S., at p. 381.

When the statute is construed according to this rule does the indictment state any violation of it? We confidently say No! The indictment shows that, so far was the defendant from having moved the cattle or live stock named in it from any quarantined state into any other state, it moved the live stock, in this case sheep, from a point outside of the quarantined state and within the state of Ohio to another point in the same state, the movement, it is obvious, being merely a terminal movement within the limits of a single city. The defendant, it is therefore obvious, did not transport the live stock from the state of Kentucky to the state of Ohio. Still less did it receive them for such transportation. The transportation from Kentucky to Ohio was complete when it received them and its receipt of them was from, not for, such transportation, as a result, not with the purpose, of such transportation.

We do not deny that it was within the power of Congress to make what the defendant did an offense, but we

do say that Congress has not done so.

The decisions under the safety appliance acts and the act to regulate commerce have no application to this case, because the language of those acts is entirely different. Neither have the decisions under Sections 4386, 4387, 4388 and 4389 or under the acts amendatory to such sections and now in force, with respect to the confinement of live stock for a longer period than twenty-eight hours, said acts being found in 34 Statutes at Large, p. 607. The difference between the two statutes is as great as it can possibly be. The act of June 29, 1906, 34 Statutes at Large, p. 607, provides:

> "That no railroad * * *, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one state * * * into or through another state * * * shall confine the same in cars * * * for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner," etc.

The statute sought to be enforced in this case provides:

> "That no railroad company * * * shall receive for transportation or transport from any quarantined state * * * into any other state * * * any cattle or other live stock, except as hereinafter provided."

So it is obvious that the decisions under these acts furnish no guide to the settlement of the question here involved.

The meaning of the act seems to us so clear as to require no authority to aid its construction. When Congress said, "That no railroad company * * * shall receive for transportation or transport from any quarantined state or territory * * * into any other state

or territory," it meant exactly what it said. To construe this as covering a carrier which did not transport from one state to another but received the cattle after the transportation from one state to another was complete, and transported them entirely within one state, is to put a forced and strained construction upon the statute.

It is well settled by the decisions that "from," when used in any context resembling this, means "from within"; and the word "into" is of so simple a meaning that, so far as we have been able to discover, no court has ever been compelled to define it. The word "from" has been decided as meaning "from within" in,

Commonwealth v. *Erie & North East R. R.*, 27 Pa. St., 339.

Western Pennsylvania R. R. Co.'s Appeal, 99 Pa. St., 155.

Tennessee & Alabama R. R. v. *Adams*, 3 Head, 596.

McCartney v. *Chicago & Evanston R. R. Co.*, 112 Ill., 611; see especially the opinion of the court, pp. 626-7.

In *B. & O. R. R. Co.* v. *P., C. & St. L. Ry. Co.*, 55 F. R., 701, where a contract had been made covering the operation of the railway between Columbus and Newark, and which contained provisions for the transportation of freight from and to Columbus and Newark and intermediate stations, the court held that this contract did not cover transportation between intermediate stations.

Again, in *Commonwealth* v. *Illinois Central R. R. Co.*, 90 S. W., 273, the Court of Appeals of Kentucky held that where a statute prohibited the bringing of Texas cattle into the state except at certain periods of the year, an indictment charging the defendant, the Illinois Central Railroad Company, with bringing Texas cattle into a

Since the foregoing brief was printed the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *St. Louis Merchants Bridge Terminal Railway Co.* v. *United States*, 188 Fed. Rep., 191, has been reported. We desire to call the attention of this court to the opinion of the Circuit Court of Appeals in that case, as it seems to us that that opinion supports the views we have expressed above by very cogent argument and reasoning.

Respectfully submitted,

JUDSON HARMON,
EDWARD COLSTON,
A. W. GOLDSMITH,
GEORGE HOADLY,
Attorneys for Defendant in Error.

certain county did not state any offense under the statute.

In *Mohawk Bridge Co.* v. *Utica & Schenectady R. Co.*, 6 Paige, 554, it was held that the charter of the Utica & Schenectady Railroad Company, which provided that its eastern terminus should be at or near the city of Schenectady, authorized it to make its terminus at any point within the city of Schenectady.

It follows, therefore, that the words "from" and "into" in this statute should be construed as meaning just what they say; that is, that the transportation which is punishable is transportation from the state of Kentucky to the state of Ohio, which, as appears by the indictment was performed by another and a different carrier from the defendant.

We therefore claim that according to sound principle, supported by a current of authority broken only by one erratic decision of a *nisi prius* court the judgment below should be affirmed.

Respectfully submitted,

JUDSON HARMON,
EDWARD COLSTON,
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GEO. HOADLY,
Attorneys for Defendant in Error.

July 26, 1911.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
THE BALTIMORE & OHIO SOUTHWESTERN Railroad Company. } No. 821.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

MOTION TO ADVANCE.

The defendant railroad company, a corporation organized under the laws of the States of Ohio and Indiana, was indicted in the District Court of the United States for the Southern District of Ohio charged with a violation of the act of Congress of March 3, 1905 (33 Stats., 1264), and the rules and regulations of the Secretary of Agriculture made and promulgated thereunder, in that said defendant, a common carrier, did receive and transport in and about the city of Cincinnati, in the State of Ohio, certain shipments of sheep originating in the State of Kentucky, which last-mentioned State had theretofore been quarantined in accordance with law for "scabies in sheep." A plea of not guilty was filed,

and it appearing to the court that a fundamental proposition of law involved in this case had been theretofore decided by it adversely to the United States in cases similar in all respects to the present one, wherein demurrers to informations had been sustained, the court, inquiring into the case upon its own motion and for the purpose of enabling the United States to have the question here at issue reviewed, found that the indictment herein was not well founded in law and quashed the same and each count thereof, and dismissed the indictment.

The proposition of law referred to, as stated by the court, was that "the defendant could not be held to answer said charge, because said informations upon their faces showed that said defendant had not received the shipments of sheep in question in the quarantined State of Kentucky and had not transported the same from said quarantined State, but that said defendant had received said shipments of sheep at a place, and had transported the same through places, wholly and entirely without said quarantined State of Kentucky; and that such facts, in the opinion of this court, did not constitute a violation of the aforesaid act of Congress."

From the judgment dismissing the indictment the Government has sued out this wirt of error under the criminal appeals act. In accordance with the provisions of that act, requiring cases thereunder to be diligently prosecuted and giving them precedence over other cases, the Solicitor General moves the

court to advance the case on the docket and set it down for hearing on a day convenient to the court during the October term, 1911.

Notice of this motion has been served on counsel for the defendant in error, and proof of service filed with the clerk.

FREDERICK W. LEHMANN,
Solicitor General.

APRIL, 1911.

UNITED STATES *v.* BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 464. Argued October 19, 1911.—Decided October 30, 1911.

Courts are not inclined to make constructive crimes, and in this case the general rule that penal statutes must be strictly construed applies.

If there be ambiguity, the character of the statute determines for strict or liberal construction, but where there is no ambiguity the words of the statute are the measure of its meaning.

A penal statute should not be construed as confounding unwillful with willful acts by uniting in criminality and penalties parties to whom no notice need be given with those to whom notice must be given.

The provisions of § 2 of the act of March 3, 1905, 33 Stat. 1264, c. 1496, forbidding receipt for transportation of live stock from quarantined points in any State or Territory into any other State or Territory, do not apply to the receipt of live stock by a connecting carrier for transportation wholly within the State in which it is received, even though the shipment originated at a quarantined point in another State.

THE facts, which involve the construction of the Cattle Quarantine Act of March 3, 1905, 33 Stat. 1264, are stated in the opinion.

The Solicitor General for the United States:

The statute applies to the shipment of sheep from a quarantined State or Territory into any other State or Territory of the Union and to every carrier participating in such shipment, not alone the initial carrier who takes up the sheep in the quarantined district and carries them without, but as well to every succeeding connecting carrier doing any part of the work of transportation neces-

sary to bring the shipment from its place of beginning to its place of destination.

Considering the statute in its entirety and the purposes for which it was enacted, it is applicable to interstate shipments of live stock from place of origin to place of destination.

As a part of the statute, too, the regulations made under it, which apply of course only to interstate shipments, must be taken into consideration. Certainly it was competent for Congress to authorize a regulation which was operative from the beginning to the end of the shipment. *Leisy* v. *Hardin*, 135 U. S. 100; *Kelley* v. *Rhoads*, 188 U. S. 1.

The intention of the framers of the law was to authorize such a regulation; see the report of House Committee, No. 4200, 58th Cong., 3d Session, February 3, 1905, recommending the law in question as tending to control and eradicate the contagious diseases of animals in the United States; see also Regulations of Secretary of Agriculture of April 15, 1907, and August 16, 1909.

The act accomplishes what Congress intended and what its efficiency requires and it should be interpreted and enforced by the light of the fundamental rule for carrying out its purposes. *Rhodes* v. *Iowa*, 170 U. S. 412. The act deals with the shipment always as an entirety.

Mr. George Hoadly, with whom *Mr. Judson Harmon*, *Mr. Edward Colston* and *Mr. A. W. Goldsmith* were on the brief, for defendant in error:

The statute is penal. *United States* v. *Southern Railway Co.*, 187 Fed. Rep. 209, holding the statute to be remedial and not penal was error; and see *St. L. Terminal Co.* v. *United States*, 188 Fed. Rep. 191.

Not only does the statute impose a money penalty in favor of the United States, not of a party aggrieved, but

it declares that the violation of its provisions is a misdemeanor punishable by fine or imprisonment or both. The fact that this defendant being a corporation cannot be imprisoned does not make the statute any the less penal. As to strict construction of penal statutes, see *Huntington* v. *Attrill*, 146 U. S., p. 667; 3 Bl. Comm. 2; *United States* v. *Sheldon*, 2 Wheat. 119; *United States* v. *Wiltberger*, 5 Wheat. 76, 95; *United States* v. *Reese*, 92 U. S. 214; *Elliott* v. *Railroad Co.*, 99 U. S. 573, 576; *Trade-Mark Cases*, 100 U. S. 82; *France* v. *United States*, 164 U. S. 676; *Bolles* v. *Outing Co.*, 175 U. S. 262, 265; *United States* v. *Harris*, 177 U. S. 305, 310; *Werckmeister* v. *Am. Tobacco Co.*, 207 U. S. 381.

The defendant did not transport the live stock from the State of Kentucky to the State of Ohio. Still less did it receive them for such transportation. The transportation from Kentucky to Ohio was complete when it received them and its receipt of them was from, not for, such transportation, as a result, not with the purpose, of such transportation.

It may have been within the power of Congress to make what the defendant did an offense, but Congress has not done so.

The meaning of the statute is clear and needs no construction. "From," when used in any context resembling this, means "from within"; and the word "into" is of so simple a meaning that, so far as we have been able to discover, no court has ever been compelled to define it. *Commonwealth* v. *Erie & N. E. R. R.*, 27 Pa. St. 339; *West. Penna. R. R. Co.'s Appeal*, 99 Pa. St. 155; *Tenn. & Ala. R. R.* v. *Adams*, 3 Head, 596; *McCartney* v. *Chi. & Evanston R. R. Co.*, 112 Illinois, 611, 626; and see also *B. & O. R. R. Co.* v. *P., C. & St. L. Ry. Co.*, 55 Fed. Rep. 701; *Commonwealth* v. *Ill. Cent. R. R. Co.*, 90 S. W. Rep. 273; *Mohawk Bridge Co.* v. *Utica &c. R. R. Co.*, 6 Paige, 554.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The defendant in error, called herein defendant, was indicted for violations of the act of March 3, 1905 (33 Stat. 1264, c. 1496), entitled "An Act To enable the Secretary of Agriculture to establish and maintain quarantine districts, to permit and regulate the movement of cattle and other live stock therefrom, and for other purposes."

Defendant entered a plea of not guilty, but subsequently the court quashed the indictment, following the ruling in certain other cases, and this writ of error was sued out to determine the validity of the ruling.

The efficient words of the statute are in § 2 (presently to be given), and prohibit receiving stock for transportation or to transport it from a quarantined State into any other State or Territory. A summary of the indictment is as follows:

The Secretary of Agriculture, in pursuance of the act of Congress, having determined the fact that a contagious and communicable disease, known as scabies, existed among the sheep in the State of Kentucky, as required by said act, promulgated an order and regulation establishing a quarantine in Kentucky, and gave public notice thereof, as required by the statute. And the indictment charges that he gave notice of the quarantine and of the rules and regulations established by him by sending printed copies of the same to defendant, and that the receipt of notice was acknowledged by the general manager.

There were three separate shipments (each of which is made a count in the indictment), of sheep from Kentucky upon different dates, and the cars containing the sheep were delivered to the Cincinnati, New Orleans & Texas Pacific Railway Company, and transported by it over its line of railroad to a point within the city of Cincinnati,

State of Ohio, and were delivered at such point to defendant, and by it conveyed over its line of railroad to the Union Stock Yards in Cincinnati, "being a place," as the indictment avers, "en route to the destination" of the shipments.

The cars in which the shipments were made did not have upon their sides, or at all, placards bearing the words "Dipped scabby sheep" or the words "Exposed sheep for slaughter," as provided in the orders and regulations of the Secretary of Agriculture, nor did the waybills, conductors' manifests, memoranda, and bills of lading have written or stamped upon their face those words, as was also required by such orders and regulations.

Section 1 of the act of Congress authorizes the Secretary of Agriculture to quarantine any State or Territory, or any portion of any State or Territory, when he shall determine the fact that there exists therein live stock affected with any contagious, infectious or communicable disease, and of such quarantine he is directed to publish notice.

Section 2 forbids railroad companies and others engaged in transportation to "receive for transportation or transport . . . *from any quarantined portion of any State or Territory or the District of Columbia into any other State or Territory or the District of Columbia*, any cattle or other live stock." The statute also forbids the delivery for transportation, or the driving on foot or transporting by private conveyance, of such stock "from a quarantined State or Territory or the District of Columbia," or from any portion of either, "into any other State or Territory or the District of Columbia." And these words are repeated in other sections as descriptive of the transportation to which the statute applies.

An offender against the statute is declared (§ 6) to be guilty of a misdemeanor and punishable by a fine or imprisonment, or by both.

The question in the case is, What did Congress intend

by the words we have italicized? Did the defendant receive the sheep for transportation from Kentucky, the quarantined State, for delivery in a State by receiving them in Ohio for delivery in Ohio?

The Government urges an answer in the affirmative and contends that not only an initial carrier, but a connecting carrier, though it receive the stock in a State other than the quarantined State (in the case at bar, Ohio), transports, within the meaning of the statute, stock "from" one State "into" another. The argument is that necessarily such connecting carrier is instrumental in the transportation of the stock from the place of shipment to its ultimate destination, and therefore within the reason and purpose of the law.

The contention is untenable. To receive a thing in Ohio is not receiving it in Kentucky, nor is transporting it in Ohio transporting it from Kentucky into Ohio. To sustain the indictment, therefore, we must disregard the plain and only direct signification of the words of the statute. Such extreme liberty with the words of a penal statute may not be taken. We are not unmindful that our function is to seek the intention of the lawmaker and that illustrations may be found where the literal meaning of words has been extended beyond their absolute sense. But the general rule is that penal statutes must be strictly construed. It is a familiar rule and need not be illustrated. The words of the statute, certainly when they have a sensible meaning and a definite and unmistakable signification, as the words of the statute under review have, mark its extent. We do not mean to say that ambiguity in words may not be resolved by the clear purpose of the statute.

If, however, there be no ambiguity, the words of the statute are the measure of its meaning. If there be ambiguity, the character of the statute determines for a strict or liberal construction. A criminal statute is strictly

construed. Courts are not inclined to make "constructive crimes." We therefore might have to decide against the indictment, even if there were more ambiguity in the statute under review than we find in it. It manifests care and a studied purpose to define the extent of the quarantine and of what shall constitute violations of it. Within its limits there shall be no delivery of stock for transportation beyond them "into any other State or Territory" by public or private conveyance or by driving. There is no obscurity whatever. A sensible, definite meaning is expressed. There must be a delivery for or a receiving for transportation "from the quarantined portion of any State or Territory . . . into any other State or Territory . . ." That reception and that transportation are the elements of the crime and must exist to constitute it. None of these elements are charged against the defendant. It did not receive the sheep for transportation in Kentucky or transport them "from" Kentucky "into" Ohio. It received them in Ohio and transported them in Ohio, and the statute thus construed adapts the remedy to the mischief. In other words, if the breaking of quarantine is prevented, the purpose of the statute is fulfilled without subjecting to criminal accusation and penalties distant carriers who, it may be, are ignorant of the existence of the quarantine; and ignorant they may be, for the statute (§ 1) requires the Secretary of Agriculture to give notice of the establishment of quarantine only to the "transportation companies doing business in or through" the quarantined State. It would be strange indeed if the statute intends to confound unwillful with willful acts by uniting in criminality and penalties the companies to which no notice of quarantine is required to be given with those to which notice is required.

We do not, of course, mean to say that the movement of sheep in Ohio, did not tend to spread the contagion, but it is certain there could have been no movement of

them in Ohio if they had not been transported "from" Kentucky "into" Ohio.

In *United States* v. *El Paso & N. E. Railroad Co.*, 178 Fed. Rep. 846, and in *United States* v. *Chicago, Burlington & Quincy R. R.*, 181 Fed. Rep. 882, the same construction was given to the statute that we have given it. Also by the Circuit Court of Appeals for the Eighth Circuit in St. Louis. *St. Louis Merchants' Bridge Terminal Ry. Co.* v. *United States*, 188 Fed. Rep. 191. In *United States* v. *Southern Railway Co.* (Circuit Court Dist. S. C.), 187 Fed. Rep. 209, a contrary ruling was made, and a connecting carrier which received stock outside of the limits of the quarantined State was held to be liable.

Judgment affirmed.